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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, and HUGH V. REYNOLDS,
Petitioners,

v.

H.K. PORTER CO., RAYMARK INDUSTRIES, INC., and PITTSBURGH CORNING CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether admiralty jurisdiction applies to tort actions for injuries (1) received on board ships, (2) by shipbuilders and ship repair workers, (3) from defective asbestos insulation products that (4) were essential to the operation of the ships and (5) intentionally designed, marketed and advertised for shipboard use.

II. Whether a rule barring such a maritime cause of action can properly be applied retroactively by a court of appeals where shipyard asbestos victims detrimentally relied on the availability of maritime remedies due to the circuit's unambiguous prior precedent and where the tortious conduct of the manufacturer/defendants occurred during a time when they could have had no expectation that shipboard injuries would be adjudicated under non-maritime law.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James T. Oman, Fred R. Walker, Willie A. Gibbons, and Hugh V. Reynolds hereby petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

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[1] The names of all parties in the court below are included in the caption of the case in this Court. Other defendants at various stages of this litigation have been Johns-Manville Corp., Johns-Manville Sales Corp., Owens-Corning Fiberglas Corp., Celotex Corp., Unarco Industries, Southern Asbestos Co., Eagle-Picher Industries, Fibreboard Corp., Keene Building Products Corp., and Nicolet Industries.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 764 F.2d 224 and reprinted as Appendix A to this petition. The judgment of the court of appeals is reprinted as Appendix C. The relevant decisions and judgment of the District Court are unreported, and reprinted here in Appendix B. The decision of the Fourth Circuit in the previous appeal in the same case is reported at 622 F.2d 234 and reprinted here as Appendix D.

JURISDICTION

The decision of the United States Court of Appeals was entered on June 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III, § 2: "The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

STATEMENT

Petitioners are four former employees of a Virginia shipyard who are now totally disabled by asbestosis, an incurable lung disease. They contracted this disease as a direct result of inhaling, over many years, the small fibers of asbestos that were released during the installation of asbestos insulation products around pipes and boilers on board ships.[2] Each of the petitioners filed suit in 1976, within two years of receiving a diagnosis of asbestosis, against respondents and several other manufacturers of asbestos products. They alleged that the manufacturers had acted negligently and in breach of warranty in failing to warn shipyard workers of the ex-

[2] Like all persons with asbestosis, petitioners also have a high risk of contracting a form of cancer known as mesothelioma, as well as other life-threatening maladies.

treme hazards associated with the intended use of their products.

The lawsuits were consolidated and first tried in 1979. The jury returned verdicts of $435,000 for each plaintiff against varying combinations of defendants. These verdicts were premised on Virginia law, since the district court had previously refused to allow the plaintiffs to prosecute claims under maritime tort law. Following the verdicts, the district court granted judgments n.o.v. for all defendants, reasoning that the evidence presented was insufficient to support the damages awarded in view of the court's restrictive statute of limitations rulings.[3]

On appeal, the Fourth Circuit vacated the judgments, and remanded for a new trial. *White* v. *Johns-Manville Corp.*, 662 F.2d 234 (1981) (Appendix D to this petition). A unanimous panel—applying the "situs" and "nexus" tests for admiralty jurisdiction set out in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972)—held that the district court should have allowed the plaintiffs to pursue maritime claims. On the key issue of maritime nexus, the court relied on the fact that the work performed by petitioners on ships is necessary to allow ships to function, and thus "has a direct effect on marine navigation and commerce." Pet. App. 54a. It also noted that the asbestos products at issue "were designed, advertised and marketed as *maritime* asbestos products." Pet. App. 54a (emphasis added). In view of these factors, the court concluded that the injuries at

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[3] The District Court held that the Virginia statute of limitations accrued at the time of "exposure" to asbestos; consequently that court limited plaintiffs' proof to asbestos exposures that occurred within two years of the date on which plaintiffs filed suit. A subsequent Virginia decision has determined that a cause of action for asbestos-induced disease accrues at the amorphous time when the disease "first exists" in the plaintiff's body, not at the time of exposure and not at the time of diagnosis. *Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

issue here were within the scope of admiralty concerns. This Court denied a petition for a writ of certiorari. 454 U.S. 1163 (1982).

On remand, petitioners underwent a second lengthy trial, this time under maritime law, against respondents and one other original defendant.[4] The jury awarded petitioners verdicts ranging from $180,000 to $285,000, and respondents then filed another appeal. On this appeal, they renewed their argument that the claims raised by petitioners are not cognizable in admiralty, filing a motion to have this issue considered by the court *en banc*. The Fourth Circuit denied this motion on July 1, 1983, but then, a year later while the appeal was still pending, changed its mind and ordered an *en banc* hearing on whether *White*, *supra*, should be overruled. Thereafter, the court stayed more than 400 other cases pending in the United States District Court for the Eastern District of Virginia—all involving asbestos-induced diseases and deaths among shipyard workers—until the resolution of petitioners' cases.

The Fourth Circuit issued its decision on June 6, 1985. By a vote of 5-3, it overruled *White*, *supra*, holding that, although the injuries occurred in a maritime "situs," petitioners' tort claims lacked a maritime "nexus." In so ruling, it adopted its own four-part test for determining when a particular tort claim is sufficiently linked to admiralty concerns to justify maritime treatment, Pet. App. 11a, thus adding still more complexity to the set of irreconcilable analyses offered up by the various courts of appeals as they have strained to exclude absestos exposure cases from admiralty.[5] Under its test, the Fourth

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[4] That fourth codefendant, Johns-Manville Corp., has since instituted bankruptcy proceedings under Chapter 11. Another codefendant, Unarco Industries, had done the same thing prior to the second trial. A sixth defendant, Southern Textile, was dismissed, while three others settled prior to or during the second trial.

[5] *See* note 9 *infra* (comparing the various tests employed in different circuits).

Circuit placed heavy reliance on the fact that the jobs held by petitioners are not comparable to those of seamen and that neither the injuries suffered nor the instrumentalities involved have a uniquely maritime character. Pet. App. 12a-15a.

The court ordered petitioners' cases remanded to the district court for yet a third burdensome trial—this one to be governed, like the first one, by Virginia law. In addition, it indicated that its new ruling would be applied "retroactively and prospectively." Pet. App. 16a.

Judges Hall, Phillips and Widener, in dissent, adhered to the views they had expressed in *White*. In addition, Judges Hall and Phillips stated that they would apply the court's new rule only prospectively.

REASONS FOR GRANTING THE WRIT

This case presents two important issues. The first involves the applicability of admiralty jurisdiction and maritime law to claims based on personal injuries inflicted on shipbuilders and ship repair workers while they were installing or replacing asbestos insulation on essential navigational machinery and systems. Despite the fact that such injuries fall well within the traditional scope of admiralty concerns, the Fourth Circuit and other courts have refused to allow victims of shipyard asbestos exposure to bring maritime tort suits. These decisions reflect a basic misunderstanding of the intent of the "nexus" requirement for admiralty jurisdiction, which this Court first set out, in a very different context, in *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra.* The clear effect of the decision below and similar rulings by other circuits is to mark a further retreat in the exercise of admiralty jurisdiction by the federal courts, a retreat this Court cautioned against in *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668, 674-75 (1982).

The second issue involves the fairness of the Fourth Circuit's decision to apply its new rule "retroactively and prospectively." Pet. App. 16a. As we have noted, in 1981, the *White* panel ruled unanimously in favor of allowing shipyard asbestos victims to sue in admiralty, thus inducing petitioners and many other victims to rely on the application of maritime law to their claims. With no regard for this justifiable reliance, the Fourth Circuit now has reversed itself retroactively. Moreover, it did so despite the fact that the respondent manufacturers had committed their tortious acts prior to *Executive Jet*, *supra*, at a time when they could have had no expectation that those acts would be governed by state law. Such a ruling raises serious and important questions about the power and the duty of federal appellate courts to limit the effect of their decisions in order to avoid manifest injustice.

I. The Fourth Circuit Imposed a Substantial and Unjustifiable Limitation on the Admiralty Jurisdiction of the Federal Courts by Establishing a Jurisdictional Test that Excludes Maritime Treatment of Injuries Caused to Workers on Ships While They Were Installing or Replacing Essential and Specially Designed Maritime Ship Components.

Stripped to its essentials, the issue decided below is whether injured and incapacitated shipbuilders and ship repair workers have a maritime cause of action against manufactruers of asbestos ship components who failed to warn those workers of the extraordinary dangers presented by their products. The Fourth Circuit's analysis of this issue, although elaborately reasoned, ultimately cannot be squared with the straightforward, commonsense approach to admiralty tort jurisdiction mandated by this Court. Because so many such claims are now pending around the country, and because the error made below has also been made in other circuits, this case presents an issue of major importance warranting review by this Court.

As the Fourth Circuit recognized, the Court in *Executive Jet* created a twofold test for admiralty jurisdiction over tort claims. First, it preserved what was originally the only test—maritime "locality" or "situs." 409 U.S. at 253-54. A maritime tort must occur on the navigable waters.[6] Then, however, the Court added a new substantive limitation—the requirement that a maritime tort also "bear a significant relationship to traditional maritime activity." *Id.* at 268.

The holding below was based entirely on this so-called "nexus" requirement.[7] The Fourth Circuit undertook a complex analysis of a catalogue of potentially relevant factors. But in so doing, it mainly revealed the problems with overly sophisticated approaches to the nexus issue. The danger is that courts will miss the forest for all the trees. Here, for example, the court below held that there were insufficient links to maritime concerns to justify admiralty jurisdiction over injuries that were (1) received on board ships, (2) by shipbuilders and ship repair workers, (3) from defective asbestos insulation products that (4) were essential to the operation of the ships and (5) were intentionally designed, marketed and advertised for shipboard use.

The result of such a decision is to distort the intended effect of the ruling in *Executive Jet*. That decision was meant to forestall the unwarranted expansion of admiralty jurisdiction over accidents that might occur at sea but had no other maritime connection. Thirteen years later, the nexus requirement is being used instead

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[6] The *Executive Jet* Court, however, noted that this general rule has been expanded by several limited exceptions involving injuries sustained wholly on land but bearing a significant relationship to maritime service, commerce, or navigation. 409 U.S. at 259-60.

[7] The court below acknowledged that the "plaintiffs' injuries satisfy the locality test." Pet. App. 7a. This was based on the fact that the injuries involved were, to a large extent, sustained while the plaintiffs were working on board ships.

as an excuse to erode the traditional reach of maritime tort law. Despite the absence of any indication that this Court intended such a result, the court below and other courts have now substantially undermined the availability of maritime tort protections to shipbuilders and repair workers—persons who, like seamen and longshoremen, have long been a particular concern of admiralty.[8]

Moreover, the fairly simple rule outlined in *Executive Jet*, aimed at excluding cases totally unrelated to maritime commerce, has given rise to a proliferation of arcane jurisdictional tests in the various circuits, which ultimately leave the scope of admiralty more unsettled than ever. While these courts have generally agreed with the Fourth Circuit on the coverage of shipyard asbestos exposure claims, their explanations are often irreconcilable.[9] *See, e.g., Harville* v. *Johns-Manville Corp.*, 731

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[8] *See, e.g.*, cases cited in note 21 *infra*.

[9] One area of dispute is the extent to which admiralty plaintiffs must be comparable to seamen. *See Austin* v. *Unarco Industries*, 705 F.2d 1, 11-13 (1st Cir.), *cert. dismissed*, 104 S. Ct. 34 (1983) (assessing issue in terms of whether plaintiffs would be able to invoke the seaman's seaworthiness remedy). *But see Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 785 n. 8 (11th Cir. 1984) (seaworthiness concept "is not directly applicable in determining the scope of maritime jurisdiction").

Another is the supposed relevance of the distinction between repair and construction work. *See Lowe* v. *Ingalls Shipbuilding*, 723 F.2d 1173, 1188, 1190 (5th Cir. 1984) (no maritime claim for construction worker; status of repair worker left open). *But see Austin, supra*, 705 F.2d at 10, 12 n. 5; *Harville, supra*, 731 F.2d at 784.

Still a third is the question whether a court should look at the maritime nature of the injury and its cause. *See Owens-Illinois, Inc.* v. *United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983) (injury and its cause "bear little maritime connection"); *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir. 1983) (relying in large part on the absence of allegations that asbestos insulation products are designed specifically for maritime use). *But see Austin, supra*, 705 F.2d at 12 (maritime claim can arise from

F.2d 775, 781 (11th Cir. 1984) ("we do not agree fully with the analysis of any of our sister circuits"). Action by this Court is thus warranted not only because the decision below was incorrect, but because many of the courts of appeals have demonstrated a real need for further guidance.[10]

To understand the extent to which the Fourth Circuit departed from this Court's analysis of maritime jurisdiction in *Executive Jet*, it is necessary to look back at that decision and the problems that inspired it. The case, which involved an *airplane* that had crashed into Lake Erie, presented the Court an occasion to bar the exercise of admiralty jurisdiction premised solely on "perverse and casuistic" applications of the situs test. 409 U.S. at 255. Some accidents—plane crashes, swimming accidents, and the like—may occur in a maritime locale, yet the invocation of admiralty jurisdiction in such cases "seems almost absurd." *Id.* at 255. The location of the injury may be "wholly fortuitous," *id.* at 266, and certainly does not, by itself, mean that traditional maritime interests are implicated in any way, *id.* at 256.

Nevertheless, while excluding such "absurd" cases from the purview of admiralty, the Court in *Executive Jet* did not evince any intention of altering the traditional scope of maritime tort jurisdiction. On the contrary, it stated that "for the traditional types of maritime torts, the traditional test has worked quite satisfactorily."[11] *Id.* at 254. More fundamentally, the Court did not reject the

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"something as unmaritime as the presence on a ship of a hazardous chemical").

[10] There is every reason to expect that the existing tests will produce widely divergent results when the issue is, not asbestos exposure, but some other kind of tort occurring in navigable waters.

[11] Indeed the Court left open the question whether claims arising from some *airplane crashes*—those involving transoceanic flights—may still be properly litigated in admiralty. *Id.* at 271-72.

time-honored principle that the constitutional provisions concerning admiralty jurisdiction [12] "warrant the most liberal interpretation." *DeLovio* v. *Boit*, 7 Fed. Cas. No. 3,776, at 443 (C.C.D. Mass. 1815) (Story, J.). Instead, it was careful to retain a basic commitment to admiralty adjudication of *all* torts that occur in navigable waters and relate in some significant way to maritime concerns.

Indeed, the Court in *Executive Jet* made this commitment clear by referring with approval to the only previous Supreme Court decision that had discussed the appropriate parameters of the nexus concept. In *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52 (1914), *discussed at* 409 U.S. at 258, the Court held that admiralty applied to a suit by a stevedore injured while loading a ship, concluding that any applicable nexus requirement would be amply satisfied on those facts. 234 U.S. at 61.[13] The Court "entertain[ed] no doubt" about the maritime nature of the activity at issue, reasoning that "[u]pon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and *it is a service absolutely necessary to enable the ship to discharge its maritime duty.*" *Id.* at 61-62 (emphasis added). Thus, even assuming that some maritime nexus was required, "the relation of the wrong to maritime service, to navigation, and to commerce on the navigable waters, was quite sufficient." *Id.* at 62.

The Court used similar reasoning, in its only post-*Executive Jet* maritime decision, to hold that admiralty jurisdiction encompasses a tort suit arising from the collision of two pleasure boats. In *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), the Court re-

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[12] U.S. Const. art. III, § 2.

[13] The *Imbrovek* Court did not decide whether a maritime nexus was required for admiralty, ruling instead that, if there was such a requirement, it was satisfied in that case.

jected the argument that the accident was insufficiently related to admiralty's prime area of concern—commercial shipping. Here again, the potential *effect* of the tortious conduct on maritime commerce was deemed sufficient. The Court explained:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct."

Id. at 674-75 (emphasis in original).

In short, this Court has made clear that the nexus test should not be interpreted as a restrictive rule that excludes tort cases involving persons or activities that have a direct impact on shipping. As long as an accident satisfies the situs test, and the injured person was engaged in conduct that plays a significant role in—or has an important effect on—maritime commerce, then the admiralty court has an interest in protecting that person through tort adjudications.

The departure from this basic approach made by the lower courts in asbestos-related litigation is striking. Much like the other courts of appeals that have arrived at the same place by varying routes, the Fourth Circuit set out a multi-factor test. It ruled that a "thorough analysis" of the nexus issue must include "at least" four factors: the "functions and roles" of the plaintiff and defendant, the "vehicles and instrumentalities" involved, the "causation and type of injury" inflicted, and "traditional concepts of the role of admiralty law." Pet. App. 11a & n.3. At least as applied below, these multiple factors serve only to impose limits on maritime tort that go far beyond anything authorized by this Court in *Executive Jet*, *Imbrovek*, and *Foremost*.

The Fourth Circuit was faced with a tort against persons engaged in an activity—installation of insulation—that directly affects both the navigational capability of the ship and the basic safety of its crew, passengers and cargo. That tort was committed by means of products that, as the court conceded, were "designed, manufactured, and advertised" specifically for use on ships. Pet. App. 15a. The level of the injury was greatly augmented by the unique working conditions that exist when insulation is installed or replaced in the cramped working spaces of a ship.[14] In such circumstances, even the Fourth Circuit's own factors could produce the correct result, if applied with any sensitivity to the underlying goal of covering all injuries that are causally linked to maritime concerns. Yet the Court took the opposite approach, straining at every opportunity to deny admiralty jurisdiction.

First, the court examined the roles of the parties. It was forced to concede that the defendant manufacturers went out of their way to enter the maritime arena by producing and selling special maritime products. Pet. App. 12a. It could hardly have done otherwise, when faced with a record of advertisements that prompted a "full line" of "marine products" with such slogans as "Keep crew and cargo safe, secure from bridge to boiler room." [15] But, for some unstated reason, the court viewed this fact as favoring admiralty jurisdiction only "slightly." *Ibid.*

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[14] As petitioner Walker testified at trial, "I guess I get more asbestos dust in a week in the boiler than I pick up in a whole year in the [landside] maintenance department." Appellees' Supp. App. in the Fourth Circuit, at 102.

[15] Appellees' Supp. App. in the Fourth Circuit, at 214. Petitioners developed a wealth of material establishing the deliberate marketing of specialized maritime products, for use on ships, by respondents. This evidence is exemplified by the materials contained in volume II of their Supplemental Appendix in the court below.

Turning to the petitioners, the court arrived at the remarkable conclusion that when they repaired and constructed ships they were not performing a function that was sufficiently related to maritime concerns. Pet. App. 12a-14a. The standard asserted by the Fourth Circuit was that maritime plaintiffs should do "what sailors normally do or used to do." Pet. App. 12a. But in using this standard, the court first erred in assuming, incorrectly, that asbestos insulation work is not among the ordinary duties of seamen. This assumption cannot be squared with the court's own decision in *Vaughn* v. *Johns-Manville Corp.*, 662 F.2d 251 (4th Cir. 1981) (per curiam), where the plaintiff was a 30-year Navy veteran who died from asbestos-induced cancer after spending most of his career as a "boiler tender"—a seaman whose job includes installing and removing insulation around boilers *while the ship is on the high seas. See id.* at 252.

Even leaving aside this factual error, the "seaman" standard itself is legally indefensible. As we have noted, this Court flatly held, in *Foremost*, that admiralty plaintiffs need not themselves actually be "engaged in commercial maritime activity" as long as their conduct has an *impact* on commerce.[16] 457 U.S. at 674-75. The Fourth Circuit ignored not only this most recent precedent but also a long line of cases barring concurrent state regulation of ship repair accidents because the maritime nature of such work made it so central a concern of admiralty. *See, e.g., John Baizley Iron Works v. Span*, 281 U.S. 222 (1930); *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449 (1925); *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479 (1923). *See also Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 116 (1962). As this Court put it in one such case,

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[16] By contrast, the Fourth Circuit has more recently held that admiralty does cover a lawsuit by a water skier against the towboat operator—on the apparent theory that water skiing constitutes navigation. *Hogan* v. *Overman*, No. 84-2114 (July 18, 1985).

"[r]epairing a completed ship lying in navigable waters *has direct and intimate connection with navigation and commerce.*" *John Baizley Iron Works, supra*, 281 U.S. at 232 (emphasis added). Finally, the Fourth Circuit took no note of the fact that *Congress* has defined ship repair and construction as "maritime employment" in the Longshoremen's and Harbor Workers Compensation Act.[17] In sum, it was only through clear errors of fact and analysis that the court was able to derive any support at all from the factor of the "role of the parties."

Next, the Fourth Circuit placed reliance on the fact that the "injury," and its "causation," were not uniquely maritime—in that other workers have been injured by asbestos in land-based settings. Pet. App. 14a. It failed, however, to offer any justification for its emphasis on the injury *per se*, independent of any consideration of the circumstances in which it was inflicted. After all, such a factor would argue against maritime treatment of a tort in every case. It is hard to imagine any shipboard injury, from a broken leg to a cut finger, that does not also occur in a non-maritime setting.[18]

As for the issue of "causation," in the court's analysis it seems to merge with the third factor—the types of

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[17] 33 U.S.C. §§ 902(3), 903(a). *See also Calbeck, supra.* Although the "situs" requirements under the LHWCA are broader than under general admiralty jurisdiction, there is no reason to conclude that the "nexus" issues should be analyzed significantly differently. In each case, the issue is the same—the need for a specialized maritime remedy.

[18] A number of decisions support admiralty jurisdiction over shipboard injuries that are roughly comparable to asbestos exposure. *E.g., Smith* v. *Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980) (unseaworthiness claim based on exposure to benzene fumes escaping from ship's storage tanks); *Martinez* v. *Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976) (unseaworthiness claim based on exposure to fumes escaping from chemical tank on barge). *See also Just v. Chambers*, 312 U.S. 383, 668 (1941) (pre-*Executive Jet* decision upholding a maritime claim based on exposure of yacht passenger to carbon monoxide).

"instrumentalities" involved. Pet. App. 14a-15a. In either case, the outcome arbitrarily depends on which of several considerations are emphasized. The court below focused on the fact that asbestos, like the materials used to make most parts of a ship, is not inherently maritime. Unaccountably, it ignored the fact that the particular asbestos products that caused the injuries here *were* specifically maritime in their design, and they caused the injuries because of the special need in ships for ample, well-maintained insulation around boilers and steam pipes.

Finally, the court purported to analyze "the traditional concepts of the role of admiralty law." Pet. App. 15a. In so doing, however, it started with a definition of maritime concerns that was much more limited than any this Court has ever suggested. Instead of asking whether maritime law is traditionally concerned with the protection of persons doing petitioners' jobs on ships, the court asked whether this case *itself* involved " 'navigation or water based commerce.' " [19] Pet. App. 15a (quoting *Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984)). This focus led to a conclusion that is flatly at odds with the whole tradition of maritime remedies not only for seamen, but for others who perform important functions on ships, including longshoremen [20]

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[19] In so doing, the Court pointed to a recitation of maritime concerns—navigation, seaworthiness and the like—set out by this Court in *Executive Jet*. Pet. App. 6a-7a (quoting 409 U.S. at 269-70). However, the court failed to note that maritime torts need only bear a "significant relationship" to such matters. 409 U.S. at 268. There is no requirement that the tortfeasor or victim actually be engaged in navigation.

[20] *See, e.g., Imbrovek, supra; Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 558 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Moser* v. *Texas Trailer Corp.*, 623 F.2d 1006, 1009-10 (5th Cir. 1980).

and ship repairmen.[21] Here again, the decision below contrasts with the broad approach taken by this Court in *Imbrovek* and *Foremost*.

In sum, the Fourth Circuit's analysis results in far greater limitations on the scope of admiralty than this Court ever intended when, in *Executive Jet*, it set out to eliminate the "absurd" consequences of the strict-locality test. It is one thing to say that airplane passengers cannot invoke maritime law when their plane "fortuitously" crashes into a lake. It is quite another to rewrite established principles concerning the interest of admiralty in the welfare of those who perform the basic functions on ships that make maritime commerce possible.

We should note, in this regard, the concrete effects that flow from this undue diminution of the maritime sphere. While nearly all of these products liability cases will remain in federal court,[22] the question of which law should govern is far from purely academic. On the contrary, the ultimate issue is whether these plaintiffs will be accorded the special rules developed to protect those exposed to the risks associated with maritime commerce.

One such protection is the application of the equitable doctrine of laches to determine the timeliness of claims.

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[21] *See John Baizley Iron Works* v. *Span, supra; Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100, 110 (5th Cir. 1970). In *Watz*, the Fifth Circuit anticipated the nexus requirement established in *Executive Jet* but still ruled that a tort suit by a repairman injured on a ship should be cognizable in admiralty. *Ibid. See also Duluth Superior Excursions, Inc.* v. *Makela*, 623 F.2d 1251 (8th Cir. 1980) (admiralty covers tort suit by injured *passenger*).

[22] In the instant cases there is complete diversity of citizenship between the plaintiffs and the defendants. The cases will therefore remain in federal court regardless of whether the governing law is maritime or state. The same is likely to be true in most asbestos-exposure tort cases.

See Giddens v. *Isbrandtsen*, 355 F.2d 125 (4th Cir. 1966). Under this doctrine, potential plaintiffs are protected when they delay filing an action for excusable reasons, such as a lack of knowledge that they have been injured by a particular product.[23] *Ibid.* Under Virginia law, by contrast, the statute of limitations extends two years from the date of "injury." Because diseases such as asbestosis are insidious and develop symptoms only gradually, there is a real danger that Virginia law will cut off claims as of a date when potential plaintiffs had no way of knowing that they were victims of asbestos exposure. *Cf. Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).[24]

The merits of Virginia law, of course, are not within the purview of this Court. But the scope of federal jurisdiction for purposes of applying federal law is another matter. By long tradition, the federal courts have an interest in applying uniform rules of federal law to protect those workers on whom maritime commerce depends. The Fourth Circuit simply chose to ignore this concern.

II. Even Assuming that the Fourth Circuit's Test Is Valid, Its Decision To Apply that Test Retroactively Represents a Clear Departure from the Governing Rulings of this Court that Will Cause Manifest Injustice.

Whatever the virtues of the Fourth Circuit's ruling on the merits, there is no basis for its further holding that the new limits on maritime law should apply "retroactively and prospectively." Pet. App. 16a. Although the

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[23] For maritime causes of action accruing since October 1980, a new federal three-year statute of limitations applies. 46 U.S.C. § 763a. However there is no reason to believe that admiralty has abandoned the key feature of the former laches rule—the principle that a cause of action does not accrue until the potential plaintiff knows, or should know, the cause of his injury.

[24] A separate problem is the danger that state law will be applied to cut off claims of plaintiffs who entered into partial settlements with other defendants. *See* pages 19-20 *infra*.

court's opinion on this issue is cryptic and somewhat opaque, the court seems to be bent on applying its new rule not only to petitioners but to the hundreds of other plaintiffs whose cases have been stayed for a year pending the outcome in this case.[25] To do so would be a true miscarriage of justice.

First, we must note that the court below seemed completely unconcerned about the fact that its own vacillation on the jurisdictional issue had forced petitioners to undergo a wholly wasted second trial of their claims, under maritime law. This two-week trial occurred at the express direction of the Fourth Circuit in the previous appeal in this case—*White* v. *Johns-Manville*, *supra*. The verdicts for petitioners were vacated, not because of any error on the part of the district court, but because it had been faithful to that express direction. Yet the Fourth Circuit not only refused to allow these verdicts to stand under standard principles of "law of the case," it forced petitioners to bear the costs of the second appeal.

Still, expense and inconvenience are in many ways the least of the problems created by the decision to apply the court's new ruling retroactively. For reasons we shall explain, petitioners and literally hundreds of other plaintiffs in the Fourth Circuit stand a chance of losing their remaining claims altogether, solely because they relied on the Fourth Circuit's 1981 ruling in *White* that maritime law applied. Despite this clear danger, the Fourth Circuit failed to respond with any limitations on the effect of its ruling—indeed even failed to analyze the issue in the terms mandated by this Court. Its failure to do so constitutes a separate basis for review in this Court.

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[25] Certainly, later plaintiffs may wish to argue for another interpretation of the Fourth Circuit's decision in the future, but we can see no other way of interpreting the term "retroactive" than to conclude that the court meant to apply its decision to all pending cases.

During the four years in which the *White* ruling was the law of the circuit, petitioners and their fellow plaintiffs were required to make key litigation decisions. For example, while petitioners themselves had filed suit prior to *White*, many others were still at the stage of deciding whether, and when, to file a complaint. As we have discussed, there are major differences between Virginia law and maritime law on the issue of when a tort suit must be filed. In Virginia, timeliness is tied to the existence of any "injury," regardless of whether it has been, or could be, diagnosed. *Locke, supra.* As a result, a potential plaintiff is obliged to rush to the courthouse as soon as he even begins to suspect that he has asbestosis, and even then he may be too late. In admiralty, by contrast, a potential plaintiff may wait until he knows or reasonably should know that he in fact has the disease.[26] In view of these differences, there is every reason to expect that many of the plaintiffs in the Fourth Circuit who made filing decisions during the years in which *White* was the controlling law will now face serious timeliness challenges from the defendants.

Moreover, petitioners and the bulk of the other plaintiffs in Virginia all had to decide during this four-year period whether to accept settlement offers from some of the codefendants. Most did accept such offers, in reliance on the rule that prevails not only in admiralty[27] but in virtually every jurisdiction in America[28] other than Virginia[29]—the rule that a settlement with one defendant

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[26] This is the rule that prevails in the vast majority of other states as well.

[27] *See Dobbins* v. *Crain Bros.*, 567 F.2d 559, 567 n.12 (3d Cir. 1977); *Cates* v. *United States*, 541 F.2d 411 (5th Cir. 1971).

[28] *See Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964).

[29] *See Potomac Hospital Corp.* v. *Dillon*, No. 840438 (Va., April 26, 1985) (statute purporting to repeal rule releasing all tortfeasors after one is released is unconstitutional as applied to causes of action that arose before the statute was passed); *Shiflet* v. *Eller*, 228 Va. 115, 319 S.E.2d 750 (1984) (same).

does not result in the dismissal of claims against the rest. Now, however, there is a risk that partial settlements will be held to bar any further claims against the present respondents.

In making each of these decisions, it was only natural that petitioners and the other plaintiffs would look to admiralty law, which the Fourth Circuit had designated as controlling. There was no reason to expect that this ruling would soon be overturned. Indeed, as we have suggested, the *White* decision is far truer to the spirit of this Court's decisions than the more recent opinion entered below.[30] As a result, the retroactive reversal of expectations that were so clearly the court's own creation simply cannot be justified.

Nor is it required by the governing law. Courts are not prohibited from changing their minds. But when they do so, they retain the authority to apply the new rule not only prospectively but "purely prospectively"—*i.e.*, to exempt from its application all those who already relied on the old rule, *including* the parties before the court. *United States* v. *Johnson*, 457 U.S. 537, 544 (1982); *Linkletter* v. *Walker*, 381 U.S. 618, 621-22 & n.3 (1965); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422-23 (1964).

Moreover, at least some form of prospectivity is *required* when a case meets the governing standards set out in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). In *Chevron*, which the court below did not even cite, this Court pointed to three controlling factors. First, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past

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[30] The Fourth Circuit encouraged this reliance when, in 1983, it denied respondents' motion for an initial *en banc* hearing on the continued validity of the *White* rule. There was no reason to believe that a panel would take it on itself to reconsider that rule. It was only a year later that the court, *sua sponte*, decided to revisit this issue *en banc*.

precedents on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106. Second, the court must consider whether retroactive application will "further or retard" the operation of the new rule. *Ibid.* Finally, the court must weigh any "inequity" that would be imposed by retroactive application. *Ibid.*

Turning to first issue, there can be no doubt that the decision below enunciated a "new principle of law." The *White* decision, after all, was overruled. It is therefore difficult to fathom the Fourth Circuit's curious comment that it was "not changing the law concerning admiralty jurisdiction, but . . . correcting an erroneous application of the nexus requirements." Pet. App. 16a. Indeed, even if *White* had never existed in the Fourth Circuit, the latest decision would satisfy *Chevron* because it involves an "issue of first impression" and the outcome certainly was not "clearly foreshadowed." The application of *Executive Jet* to exclude ship repair accidents was hardly "obvious." [31]

As for the second factor, it was not addressed at all by the court below. Perhaps that is because there is no conceivable way in which it would "retard" the operation of the new rule to recognize a potential injustice to a discrete group of plaintiffs and grant them an exemption.

Finally, there is the key question of equity to the parties. Here, again, it cannot really be said that the

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[31] As a matter of fact, some of the key litigation decisions with respect to those plaintiffs may even have been made, through inaction, prior to the 1972 *Executive Jet* decision itself. If a worker was suffering from breathing problems in the 1960s, but he did not yet have a diagnosis, his time for filing a suit under Virginia law may have run out long before *Executive Jet* came along—*i.e.*, during a time when all of these cases were clearly in admiralty under the old "strict locality" test. In such an event, a plaintiff would have a strong argument for prospective application of *Executive Jet*. But this is just another possible argument that the Fourth Circuit casually foreclosed in its ruling.

Fourth Circuit addressed the issue. Its only relevant statement is the remarkably insensitive comment that respondents "should not be denied the fruits of their labor in finally convincing a majority of this Court of the merit of their position." Pet. App. 16a. Under *Chevron*, the issue is not the persistence of the respondents, but the justifiable expectations of both parties.

We have already explained the detrimental reliance problems for plaintiffs created by the Fourth Circuit's change of course. They now run the risk of losing their remaining claims due to the unexpected application of an unfair Virginia statute of limitations or an anachronistic Virginia rule on settlements with joint tortfeasors. They face this risk solely because they took the Fourth Circuit at its word in *White* and made critical litigation decisions based upon maritime law. But the most distressing element of the court's retroactivity decision is its failure to recognize the *respondents'* total lack of any claim of unfairness in the event the new rule is applied prospectively.

The plain fact is that the vast majority of the respondents' tortious acts occurred prior to the 1972 decision in *Executive Jet*, during a time when all torts in the navigable waters, of whatever nature, were cognizable in admiralty. As a result, they could not, at that time, have had any expectation that shipyard exposures would be shielded from application of maritime principles. Moreover, even if respondents had focused exclusively on state law in determining whether to warn those working with their products, they would have had to consider not only Virginia but the many other states in which they distributed their products. On the key issues here—the availability of a "discovery" rule for limitations purposes, and the availability of partial settlements with joint tortfeasors—Virginia is in a narrow minority. Virtually all other states follow the same principles that are applicable in admiralty. In sum, there can be no claim that respondents acted in reliance on the assump-

tion that Virginia law would be applied to claims of this kind. The decision below is, for them, a pure windfall.

In such a setting, we submit, the *Chevron* principles do not allow a court to brush aside a request for prospective application of a new rule.[32] A potential injustice was created by the Fourth Circuit's own vacillation on the scope of admiralty jurisdiction. That court was not authorized to ignore the risk that it had created. Because the Fourth Circuit departed so drastically from this Court's governing rulings, on an issue of such importance to so many litigants in the Fourth Circuit, we ask the Court to grant review on this issue even if it is inclined to accept the outcome below on the merits.

CONCLUSION

For these reasons, we respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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[32] Some of the language in the decision below suggests a view that equitable concerns may not become a vehicle for extending federal *jurisdiction*. Pet. App. 16a ("The potential injustice to these plaintiffs from the application of a short statute of limitations does not mandate this court to assert its admiralty jurisdiction.") But, as we have noted, petitioners' cases, along with all the other cases pending in the district court, are properly in federal court in any event, because of diversity of citizenship. Thus, the issue decided below was purely one of choice of law.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-1821

JAMES T. OMAN; FRED R. WALKER; WILLIE A. GIBBONS, and HUGH V. REYNOLDS,

Appellees,

versus

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORP.,

Defendants,

and

PITTSBURGH CORNING CORPORATION,

Appellant,

No. 82-2042

JAMES T. OMAN; FRED R. WALKER; WILLIE A. GIBBONS, and HUGH V. REYNOLDS,

Appellees,

versus

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; SOUTHERN TEXTILE CORPORATION and EAGLE-PICHER INDUSTRIES, INC.,

Defendants,

and

RAYBESTOS MANHATTAN, INC.
(now RAYMARK INDUSTRIES, INC.);
H. K. PORTER COMPANY and
PITTSBURGH CORNING CORPORATION,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, Chief District Judge, (C/A 82-22-NN), and J. Calvitt Clarke, Jr., District Judge, (C/A 82-0022).

Argued: October 2, 1984 Decided: June 6, 1985

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges.

Archibald Wallace, III (Nathan H. Smith, Sands, Anderson, Marks & Miller; John B. King, Jr., Robert L. O'Donnell, Vandeventer, Black, Meredith & Martin; William V. Hoyle, Charles A. Smith, W. Vinton Hoyle, Jr., Hoyle, Corbett, Hubbard & Smith on brief) for Appellants; Joel I. Klein (Paul M. Smith, Onek, Klein & Farr; Robert R. Hatten, Patten, Worrom & Watkins; Richard S. Glasser, Glasser & Glasser on brief) for Appellees.

CHAPMAN, Circuit Judge:

In this consolidated appeal we consider whether the federal courts may assert admiralty jurisdiction over manufacturers of products containing asbestos for injuries to land-based ship repair workers which injuries were allegedly caused by exposure to air-borne asbestos fibers. The parties argued this appeal before a three-judge panel on November 1, 1983. On June 6, 1984, this court, *sua sponte*, called for an *en banc* hearing of this appeal to reconsider *White v. Johns-Manville Corporation*, 662 F.2d 234 (4th Cir. 1981) (*White II*). Today we overrule *White II*, adopt a four-part nexus test and hold, under the nexus test, that the federal courts may not exercise admiralty jurisdiction over damage claims by land-based ship repair or construction workers for employment-related, asbestos induced disease. In doing so we reverse the district court and remand the case for further proceedings consistent with this opinion.

I

This appeal grows out of four of the thousands of cases brought throughout the country against the manufacturers

of asbestos containing products by workers who have contracted asbestosis and its related diseases. Plaintiffs, James T. Oman, Fred R. Walker, Hugh V. Reynolds, and Willie A. Gibbons, were land-based shipyard workers for Newport News Shipbuilding and Drydock Company. They claim to have contracted asbestosis after being exposed to asbestos fibers in the course of their employment.

In 1976 each plaintiff brought an action in federal court against the defendants, Johns-Manville Corp., Johns-Manville Sales Corporation, successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan, Inc.; The Celotex Corporation; Unarco Industries, Inc.; H. K. Porter Company; Southern Textile Corporation; Eagle-Picher Industries, Inc.; Owens-Corning Fiberglas Corp. Generally, injured workers bring these types of actions in state court or in the federal courts under diversity jurisdiction. In either forum state substantive law governs. These plaintiffs, however, alleged that the district court could exercise its admiralty jurisdiction in their cases because of their employment in a shipyard. They claim to be in admiralty but they admittedly do not perform tasks traditionally done by sailors.

After consolidating these cases, the district court, in March 1978, issued an order declining to assert admiralty jurisdiction because the alleged injuries bore no reasonable relationship to traditional maritime activity. Throughout the entire history of these cases the defendants have objected to the exercise of admiralty jurisdiction.

After the trial of their cases plaintiffs appealed from the March 1978 order, as well as two others.[1] A three-judge panel of this court vacated the order of the district court. *White*, 662 F.2d at 238-40.

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[1] See *White II* for a complete procedural history of this case.

Since *White II* was decided five other courts of appeal [2] have considered this issue and for different reasons have rejected *White II* either in whole or in part. By different analyses, each circuit has concluded that admiralty jurisdiction does not extend to damage claims by land-based ship repair or construction workers for employment-related, asbestos-induced disease.

We now join these circuits. Before we conduct the analysis by which we reach this decision, we must discuss admiralty jurisdiction in general and our reasons for overruling *White II*.

II

Historically, federal courts used a situs or locality test to determine if a tort action was within admiralty jurisdiction. If the tort occurred upon the high seas or navigable waters the federal court could exercise its admiralty jurisdiction pursuant to Article II, Section 2 of the United States Constitution and 28 U.S.C. § 1333(a). *See The Plymouth*, 70 U.S. (3 Wall) 20, 35-36 (1866). The federal courts tend to exercise admiralty jurisdiction restrictively because its use invokes substantive maritime law which "may tend to preempt state regulation of matters traditionally within the ambit of local control." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 780 (11th Cir. 1984). In discussing this principle the Supreme Court stated:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary

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[2] *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir. 1983).

> sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 272-73 (1972) (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971)).

In *Executive Jet* the Supreme Court rejected the use of the mechanical and simplistic locality test as the exclusive test for admiralty jurisdiction. In reaching this decision the Supreme Court discussed some of the problems with the locality test, especially the absurdity of invoking admiralty jurisdiction for torts which satisfy the locality test, but have absolutely no connection with maritime activity, *Executive Jet*, 409 U.S. at 255-56, and discussed the creation of numerous exceptions to the rule. *Id.* at 259-60. In light of this, the Supreme Court held that the location of the tort in maritime waters was insufficient by itself to invoke admiralty jurisdiction. To the traditional maritime location requirement the Court added an additional requirement that the wrong bear a "significant relationship to traditional maritime activity." *Id.* at 268. In applying this additional nexus requirement the Court found it necessary to consider the history and purpose of admiralty law:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe.

> Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and other claims for salvage.

Id. at 269-70. This rationale underlying admiralty jurisdiction gives us guidance in deciding when the "law of the sea" should govern a particular case.

Executive Jet involved the crash of an airplane into Lake Erie and the Supreme Court did not clearly indicate that the additional nexus requirement applied to all tort cases in which a party sought to invoke admiralty jurisdiction. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Supreme Court made it clear that this two part test for admiralty jurisdiction applied to all tort cases in which a party sought to invoke the federal court's admiralty jurisdiction. *Id.* at 674; *see Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville*, 731 F.2d at 781.

III

We must review *White II* in light of the Supreme Court's reasoning in *Executive Jet* and *Foremost Insurance*. In *White II* this court first held that the location test had been met. We agree with *White II* that the plaintiffs' injuries satisfy the locality test.

> In the present case, the plaintiff employees alleged in their complaint that they had installed asbestos insulation materials during ship construction and repair in the course of their employment with Newport News. Their work was performed at both the shipyard and drydock areas as well as aboard the vessels while they were located on navigable waters. Thus, the allegations would meet the locality test of *Executive Jet*.

White II, 662 F.2d at 239; *Harville*, 731 F.2d at 783.

The court then held that the work done in the shipyards by the plaintiffs bore a significant relationship to traditional maritime activity because the installation of the asbestos products has a direct effect on marine navigation and commerce. *White II*, 662 F.2d at 239.

> [E]ach of these employees spent a significant part of his working career in the fabrication and replacement of various types of asbestos insulation materials for use on public and private ships. Without such shipyard efforts, these vessels would have been unable to perform their maritime role as carriers of people and cargo. Thus, installation of insulation materials, which by their very nature become an appurtenance, or integral part, of the ship, is clearly essential to the maritime industry. Therefore, the work done by these shipyards bears a "significant relationship to traditional maritime activity" because the installation of the asbestos products has a direct effect on marine navigation and commerce.

That second holding was then limited to the particular circumstances of the cases, "when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products . . ." *Id.* at 240.

We are overruling *White II* for two reasons: (1) the analysis used to reach the holding that the nexus test had been met is flawed and (2) the cases relied on by the Court in *White II* are distinguishable. In discussing the nexus test and *Executive Jet*, the Court stated, "The opinion of the [Supreme] Court [in *Executive Jet*] gives no indication as to what actual activities would satisfy the maritime 'nexus' test." *Id.* at 239. The court overlooked the Supreme Court's discussion of the history and purpose of admiralty law, see *Executive Jet*, 409 U.S. at 269-70 (quoted *supra* p. 7), which does give us guidance concerning the activities which satisfy the nexus test.

The Court, without the benefit of this guidance, then proceeded to analyze the facts in *White II* to determine if the nexus test had been met. In its analysis the Court focused almost exclusively on the function of the plaintiffs to reach its holding. "Hence, we must examine the function of these shipyard workers in fathoming their relationship to maritime commerce and navigation." *Id.* at 239. Although *White II* correctly discussed the importance to the maritime industry of the work done by these plaintiffs at the shipyards, nevertheless the Court reached the wrong conclusion because the Court failed to examine all the factors necessary for a complete analysis of the nexus relationship. By focusing exclusively on the plaintiffs and the work they performed, this Court overemphasized that factor and, in effect, created a mechanical test inconsistent with the Supreme Court's reasoning in *Executive Jet* and *Foremost Insurance.*

Also, in focusing on the plaintiff's activities the Court failed to consider that the activities of these plaintiffs were not the types of activities traditionally done by sailors.

Furthermore, the cases relied upon for support in *White II* are distinguishable. *White II* relied on *Pan-Alaska, Fisheries, Inc. v. Marine Construction,* 565 F.2d 1129 (9th Cir. 1977); *JIG the Third Corp. v. Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975); *Jones v. Bender Welding & Machine Works, Inc.,* 581 F.2d 1331 (9th Cir. 1978); and *Sperry Rand Corp. v. Radio Corporation of America,* 618 F.2d 319 (5th Cir. 1980). In *Pan-Alaska* a ship caught fire and sank because of a defective fuel filter. In *JIG the Third Corp.* a ship sank because of a malfunctioning steel shaft. In *Jones* the ship's engine repeatedly failed because of manufacturer defects in the engine. In *Sperry Rand* the vessel grounded and was involved in a collision because of a defect in its gyro-pilot steering system. Unlike the present cases those four cases involve situations in which the defective products caused injuries to the ship which

specifically implicated the maritime concerns discussed by the Supreme Court in *Executive Jet*. See *supra* p.7.

The present cases involve injuries which do not implicate those maritime concerns and are not unique to seamen.

> The plaintiffs here were engaged in trades, such as pipefitting, welding, and insulating, linked more with the land than with the sea. Their skills and training are those of landsmen, not of sailors. The plaintiffs' "role and function", although related to maritime commerce do not call for the application of admiralty jurisdiction . . . Nothing about the underlying claims would be different if the plaintiffs had been employed constructing or repairing buildings on land.
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> . . .
>
> We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in *Executive Jet* are involved. Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution.

Harville, 731 F.2d at 785 and 786.

In this case the injury producing material was not the insulation but the asbestos fibers contained within the insulation. These naturally occurring fibers do not raise the same concerns as a gyro-pilot steering system; nor do the injuries produced by these fibers raise the same maritime concerns as the injuries caused by the malfunctioning steel shaft, the defects in the engine, or the defects in the fuel filter.

This would be a completely different case if these manufacturers were being sued because the asbestos was de-

fective and, as a result, a fire spread throughout a ship causing it to sink. In such case the injury would be peculiar to admiralty and would invoke maritime concerns such as those mentioned by the Supreme Court in *Executive Jet*. *See Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 10-11 (1st Cir. 1983).

Furthermore, the requirement in *White II* that the materials which caused the injuries be designed, advertised, and marketed as maritime products creates a mechanical analysis inconsistent with *Executive Jet* and *Foremost Insurance*. Under this requirement the nexus test would be met with some products whose use in maritime commerce is important but which do not raise the traditional maritime concerns discussed in *Executive Jet*. Other products which were not designed, advertised, and marketed as maritime products, but do invoke those maritime concerns, would not satisfy the nexus test. *See Austin*, 705 F.2d 9-11.

IV

Instead of the *White II* analysis, we adopt a nexus test by which we must consider four factors [3] in analyzing the relationship a given claim bears to traditional maritime activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law. *Myhran*, 741 F.2d at 1121; *Harville*, 731 F.2d at 783; *Owens-Illinois v. United States District Court*, 696 F.2d 967 (9th Cir. 1983).

Although the plaintiffs have met the locality test, we hold that their claims are not cognizable in admiralty because their claims do not bear a significant relationship

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[3] The other circuits which have considered this issue have considered either some or all of these four factors. We believe that a thorough analysis of the nexus requirement should include a consideration of at least these four factors.

to traditional maritime activity under our application of the four part nexus test. First we must consider the functions and roles of both the plaintiffs and the defendants. The function and role of the defendants slightly favor the exercise of admiralty jurisdiction. The materials used by the shipyard workers were "designed, advertised and marketed as maritime asbestos products . . . ." *White II*, 662 F.2d at 240; *but see Harville*, 731 F.2d at 784 ("The defendants [as in this case Johns-Manville] . . . are land-based manufacturers whose asbestos products, although important components in the construction and maintenance of vessels, were not designed specifically for maritime use."); *Austin*, 705 F.2d at 10 (". . . whatever advantage accrues from a uniform national law governing those cases would be severely undercut by distinguishing between manufacturers according to whether they designed or intended their products for maritime use"). Of the four factors this part of the first factor is the only one which favors the exercise of admiralty jurisdiction.

Next we consider the function and role of the plaintiffs. All four were pipe coverers or insulators. As we have discussed, *supra* p. 8, we agree with *White II* that the work done by these plaintiffs was important to maritime commerce. *White II*, however, overemphasized the role and function of the plaintiffs and, in so doing, elevated their function into something it is not—a maritime activity.

Importance to maritime commerce by itself is not sufficient to bring an activity within the scope of admiralty jurisdiction. *Harville*, 731 F.2d at 784. To be in admiralty the plaintiffs must have been doing what sailors normally do or used to do.

> More germaine is whether the activity is of a "maritime" nature. Courts have tended to describe contracts for ship repair as "maritime". . . . Nevertheless, in a tort case to label a pipefittter's occupa-

> tion "maritime" on Monday because he is working on repairs to a completed vessel and to call identical work done on Tuesday "non-maritime" because he labors aboard an unfinished hull, is to retreat into the same sort of mechanical analysis dependent on fortuity that the Supreme Court condemned in *Executive Jet*. . . . [T]he question properly asked is whether the actual tasks the workers perform bear any inherent relationship to maritime activity, that is, whether the plaintiffs' jobs are identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard ship, or whether they are tasks somehow unique to maritime service or work traditionally done by seaman.

Id. at 784-85 (citations omitted). As pipe coverers and insulators these plaintiffs had the skills and training of landsmen, and not of sailors. Sailors occasionally may be called upon to take out a patch of insulation and replace it in an emergency, but that type of activity is normally done by landsmen. Although their roles and functions were related to maritime commerce, this factor does not call for the application of admiralty jurisdiction. *Id.* at 785; *Myhran*, 741 F.2d at 1122; *see Lowe v. Ingalls Shipbuilding, a Division of Litton Systems, Inc.*, 723 F.2d 1173, 1188 (5th Cir. 1984).

In *Lowe* the Fifth Circuit questioned *White II*'s rationale that because the products "become an appurtenance, or integral part, of the ship," therefore their installation "has a direct effect on marine navigation and commerce." *White II*, 662 F.2d at 239. The Fifth Circuit considered this rationale to be

> contrary to the rule that ship construction contracts are not maritime and to the statement in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157-66 L.Ed. 321 (1922), that neither a ship construction worker's "general employment" nor his

> work on an incomplete ship lying in navigable waters "had any direct relation to navigation or commerce." *Id.* at 476, 421 S.Ct. at 158. *White II* gives no express consideration to these principles.

Second we consider the causation and type of injury. "The non-maritime nature of the plaintiffs' injuries, injuries that now afflict thousands of land-based workers as well, militate strongly against application of maritime jurisdiction." *Harville*, 731 F.2d at 785; *see Myhran*, 741 F.2d at 1122-23 ("[A]sbestos does not bear any inherent relationship to maritime activity, nor is it unique to maritime service."); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983) ("[B]oth the injury and its cause are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters.") We agree that the causation and type of injuries to the plaintiffs do not support the invocation of admiralty jurisdiction.

Third we examine the types of vehicles and instrumentalities involved. Although these plaintiffs were exposed to asbestos aboard ships, the involvement of the ships is at most tangential to the nature of their tort claims and has no effect on the character of those claims. These claims would be exactly the same if the plaintiffs had been employed constructing or repairing buildings on land. *Myhran*, 741 F.2d at 1122; *Harville*, 731 F.2d at 785.

> While ships were obviously involved here, the tools and safety equipment (or lack thereof) present in the installation and clean-up of asbestos—unlike the navigational equipment and safety devices of a vessel —possess few maritime attributes. The use of masks, unlike the provision of lifeboats, is hardly a precautionary measure distinctively connected to traditionally maritime activity.

Owens-Illinois, 698 F.2d at 971. The simple fact that these plaintiffs were injured aboard ship does not support or justify admiralty jurisdiction.

Insulation containing asbestos is the other instrumentality involved. Although the particular insulation products may have been designed, manufactured, and advertised as maritime or marine insulation, such insulation has no uniquely maritime character and exposure to asbestos does not bear any inherent relationship to maritime activity. *Myhran*, 741 F.2d at 1122; *Harville*, 731 F.2d at 785.

Finally we consider the traditional concepts of the role of admiralty law, the most important factor. We have previously discussed the history and purpose of admiralty law as described by the Supreme Court in *Executive Jet* and *Foremost Insurance*. Disputes which do not involve these interests should not fall within the admiralty jurisdiction of the federal courts. None of the issues listed by the Supreme Court in *Executive Jet* and *Foremost Insurance* are involved in this action.

> Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution. Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty.

Harville, 731 F.2d at 786. Furthermore, the resolution of these tort claims does not "require the special expertise of the court in admiralty as to navigation or water-based commerce, nor is there any federal interest in uniformity of decision requiring the application of federal substantive law." *Myhran*, 741 F.2d at 1122.

The federal interest in uniformity of the law governing maritime matters favors our decision in this case.

Each circuit that has considered the issues raised in *White II* and in this case has rejected the exercise of admiralty jurisdiction. Thus, *White II* is a deviation from a uniform view held by the other circuits. With this decision uniformity is restored.

V

Plaintiffs argue that this decision should be applied prospectively only. We disagree and apply it retroactively and prospectively. With this decision we are not changing the law concerning admiralty jurisdiction but are correcting an erroneous application of the nexus requirements. *White II* failed to recognize what type of activities satisfy the maritime nexus test and the defendants from the very beginning of this litigation have consistently objected to admiralty jurisdiction. They should not be denied the fruits of their labor in finally convincing a majority of this court of the merit of their position.

Plaintiffs are understandably concerned about the problems they face with the Virginia statute of limitations. The potential injustice to these plaintiffs from the application of a short statute of limitations does not mandate this court to assert its admiralty jurisdiction. "By granting the federal courts jurisdiction over maritime disputes, the Constitution does not license them to repair injustice wherever they may perceive it. The purpose of admiralty jurisdiction is not to permit the federal courts to recognize causes of action for claims they believe meritorious whenever state law precludes such claims." *Harville*, 731 F.2d at 786. Virginia's statute of limitation is a matter of state concern, governed by state law, which we may not interfere with in this case.

VI

The defendants have raised three other issues for our consideration: (1) whether the district court abused its discretion concerning certain procedural matters at trial;

(2) whether the district court erred in failing to grant certain motions by Raybestos and Pittsburgh Corning for summary judgment or judgment NOV; and (3) whether the district court erred in charging the jury concerning the defendants' duty to warn these plaintiffs when the plaintiffs' employer had an equal or greater knowledge of the dangers associated with the allegedly defective product.

The defendants contend that the district court abused its discretion by denying their motions for a change of venue or a change of venire and by scheduling multiple plaintiffs' trials instead of individual trials. These are matters within the sound discretion of the district court. We have considered the arguments presented by the defendants and find that the district court did not abuse its discretion concerning these matters.

The second claim is that the district court failed to grant the motions of Raybestos and Pittsburgh Corning for summary judgment or judgment NOV. Because we are remanding this case to the district court for further proceedings and because our decision in this appeal may have a profound effect upon the parties we refuse to reach this issue. The district court should reconsider this on remand.

The third and final issue presented for review concerns the sufficiency of the district court's charge to the jury regarding the defendants' duty to warn. The defendants argue that the district court should have charged the jury that the manufacturer's duty to warn the ultimate users, the employees, is satisfied if a sophisticated employer is aware of the dangers involved in the use of the product.

In *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979), the Supreme Court of Virginia adopted *Restatement (Second) of Torts* § 388 (1965) to govern a manufacturer's duty to warn about

dangers associated with a product's use.[4] *Featherall*, 219 Va. at 962, 252 S.E.2d at 366. Virginia law includes comment n of § 388, "Warnings given to third person." *Jones v. Meat Packers Equipment Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *Barnes v. Litton Indus. Products, Inc.*, 555 F.2d 1184, 1188 (4th Cir. 1977); *Goodbar v. Whitehead Bros.*, 591 F.Supp. 552, 557 (W.D.Va. 1984).

Comment n discusses the various factors a court must balance to determine what precautions the manufacturer or supplier of a product must take to satisfy the requirement of reasonable care found in § 388(c). These factors include: (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed upon the supplier by requiring that he directly warn all users. These considerations must be balanced to determine if the manufacturer owes a duty to place a warning on his product.

In this case the product, because it contained asbestos fibers, was very dangerous. The burden on the manufacturers in placing a warning on the product was not

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[4] Section 388 states:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

great. The employer was unaware of the danger until 1964. Finally, once the employer became aware of the potential danger it failed to convey its knowledge to its employees. We cannot say that the district court erred in refusing to give the charge requested by the manufacturers under the set of facts involved in this case.[5]

The decision in the district court is reversed and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[5] Comment n to § 388 supports this conclusion:

> Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them.

HALL, Circuit Judge, dissenting:

Because I believe that the reasoning in *White v. Johns-Manville Corporation*, 662 F.2d 234 (4th Cir. 1981) (*White II*) continues to be sound, I dissent from the majority's jurisdictional analysis in this case and adhere to my conclusion in *White II* which found the exercise of admiralty jurisdiction proper. I am also of the view that the majority's opinion overruling *White II* should be applied prospectively only.

I am authorized to state that Judge Phillips joins in this opinion.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent and adhere to the view I expressed in *White II*, 662 F.2d 234 at p. 241.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

J. T. OMAN, *et al.*,
Plaintiffs,

v.

JOHNS-MANVILLE CORPORATION, *et al.*,
Defendants.

[Filed July 26, 1982]

ORDER

Certain issues are now before the Court for resolution prior to the beginning of the trial in these cases on July 27, 1982.

(1) All counsel having agreed thereto, the Court ruled that the cause of each plaintiff shall be determined to have accrued on the date when the plaintiff discovered or in the exercise of reasonable care should have discovered that he had asbestosis.

(2) In determining whether an action has been timely brought by any of the plaintiffs herein, the Court will apply the admiralty doctrine of laches as interpreted in *Giddens* v. *Isbrandtsen Company*, 335 F.2d 125 (4th Cir. 1966).

(3) If an action has been timely brought by a plaintiff, he thereafter will not be restricted in the

proof of his damages to the laches period. *Urie* v. *Thompson*, 337 U.S. 163 (1949); *Young* v. *Clinchfield Railroad Co.*, 288 F.2d 499 (4th Cir. 1961).

(4) The Court rejects the plaintiffs' request that it adopt a share of the market theory for the reason that:

(a) In the cases cited by the plaintiffs, those plaintiffs were unable to identify the manufacturers of the asbestos products they were exposed to.

(b) In these cases, the plaintiffs have available to them testimony and shipyard records with which to establish the identity of the products that they were exposed to.

(5) The Court will determine after hearing the evidence whether it will submit to the jury the issue of apportionment of a plaintiff's disability on a percentage basis among the suppliers of the products to which he was exposed (whether those suppliers are defendants in this action or not) or on the other hand, whether the disease of asbestosis is indivisible. The manner in which the jury will be permitted to fix damages will depend upon the rulings to be made as herein set forth.

(6) The Court will not permit evidence or mention of settlements made by other suppliers who are not currently defendants in this case, as such evidence would tend to compromise the remaining defendants' denial of liability and any mention of the amounts of settlements would substitute the lawyers' evaluation of the damage for that of the jury.

(7) The Court considers the law of admiralty to be the law of the case and it will not be necessary to prove a maritime application of the defendants'

products. The Court is of the opinion that the Fourth Circuit in *White* v. *Johns-Manville,* No. 79-1854 has mandated such a conclusion.

/s/ [Illegible]
United States District Judge

July 26, 1982

Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 82-22-NN

JAMES T. OMAN, FRED R. WALKER,
HUGH V. REYNOLDS, and WILLIE GIBBONS,
Plaintiffs,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; and PITTSBURGH CORNING CORPORATION,
Defendants.

[Filed Oct. 21, 1982]

MEMORANDUM OPINION

The defendants have raised several post-jury verdict issues seeking to stay further proceedings or to set the verdict aside. The parties have briefed the issues and they are now ripe for decision.

Motion to Stay Entry of Judgment

(Filed by all defendants)

The defendants have moved that this Court stay all further proceedings against them, including the entry of

judgment, because of the recent Chapter 11 reorganization filing of the defendant Johns-Manville Corp. The defendant relies on 11 U.S.C. § 362(a)(1) which provides:

> A petition . . . operates as a stay to all entities, of:
>
> (1) . . . Proceeding against the debtor or other proceedings against the debtor that was . . . commence[d] before the commencement of the case under this title. . . .

The defendants argue that when 362(a) refers to "all entities" it is referring to codefendants who are also liable to a creditor of the bankrupt. The Court believes this to be an overly expansive reading of the statute.

The defendant cites as support the case of *In Re White Motor Credit Corp.*, 11 Bankr. Rep. 294 (Bnkr. N.D. Ohio 1981). In *White*, the Court did stay all proceedings in which the debtor was involved. The Court stated that the stay operates as "a windfall benefit to codefendants." However, without commenting on the correctness of the *White* decision, this Court does not feel compelled to follow it. The Court feels the better course to follow is to give the statute a literal reading. The statute refers to proceedings against the *debtor*. This is in line with the Code's desire to relieve the debtor of some of his financial burdens and thus allow the debtor to get his finances in order. It is also apparent from a literal reading of "to all entities" refers to those persons (creditors) who may be acting adverse to the debtor's rights. It is difficult for the Court to see how staying proceedings involving codefendants or staying the entry of judgment against codefendants will help the debtor at all. More importantly, it is difficult to see how not staying the entry of judgment will prejudice the debtor in any way. Certainly, such has not been established in this case.

There are hundreds of asbestos cases against numerous defendants pending in this Court. Johns-Manville has

filed for reorganization and not for straight bankruptcy under the Act. It might take some months for the Bankruptcy Court to determine if Johns-Manville is in fact in such present financial jeopardy as to entitle it to proceed under the Act. If the Bankruptcy Court determined that Johns-Manville was ineligible and dismissed the petition, the temptation might be great for another defendant to follow the same path as had been followed by Johns-Manville. This could be done by each defendant consecutively, thus delaying the rights of the plaintiffs to a reasonably prompt adjudication of their Complaints.

Refusal of Court to Give a Proportionate Fault Instruction

(Filed by all defendants)

The defendants claim the Court was in error when it refused to give the jury a "proportionate fault" instruction. The Court stated at the time that proportionate fault was not an issue, but that the issue was proportionate contribution to an indivisible injury. Nothing has been brought to the Court's attention through the defendants' briefs which would lead this Court to now believe otherwise.

The defendants have relied upon *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), to support their position. However, even in *Reliable*, the court stated, ". . . liability for such damages is to be allocated equally only when the parties are equally at fault *or when it is not possible fairly to measure the comparative degree of their fault* (emphasis added) (*Reliable* at 411). Even if degrees of fault were an issue, the exception would apply for there is no logical way of measuring the proportionate fault of the defendants. The Court reiterates, however, that the issue is how much each defendant's fault contributed to an indivisible injury. This is impossible to determine as the evidence clearly estab-

lished. Thus, the jury need not have been instructed on the proportionate fault issue.

Accordingly, for all of the reasons stated herein and at trial, the Court FINDS that there was no error committed by its failing to give the requested "proportionate fault" instruction.

Failure of the Court to Submit the Issue of Laches to the Jury

(Filed by H. K. Porter/Southern Textile and Pittsburgh Corning)

The defendants have alleged error in the Court's decision not to submit the question of laches to the jury. They claim that evidence was presented which proved that the plaintiff, Mr. Reynolds, knew or should have known, sometime between 1966-71, that he had contracted asbestosis.

This case is very similar to *Young* v. *Clinchfield Railroad Company*, 288 F.2d 499 (4th Cir. 1961). That case involved a suit by a railroad employee to recover for silicosis. The defendant in *Young* argued, for much the same reasons as the defendants here, that the question of laches should be submitted to the jury. In both cases, the plaintiff had seen a doctor and was suffering from symptoms of the disease. However, in neither case was the doctor able to diagnose the disease in question. The language and logic applied by the Fourth Circuit in *Young* applies equally to the case at bar:

> Residence in the mining country of West Virginia does not invest one with the expert knowledge or diagnostic skill sought to be attributed to the plaintiff. The sought for inference could rest on nothing more than speculation. . . .
>
> A medical judgment that eluded the specialist cannot reasonably be expected from the plaintiff. . . .

> We find no error in the district court's refusal to submit to the jury an issue that is without any support in the evidence.

Likewise in this case, there is simply no support in the evidence for the proposition that the plaintiff should have known, even before he was told by his doctor, that he was suffering from asbestosis.

Accordingly, the Court FINDS that there was no error in refusing to submit the question of laches to the jury.

Was admiralty law the law of the case?

(Filed by H. K. Porter/
Southern Textile and Pittsburgh Corning)

The defendants challenge the establishment of admiralty jurisdiction and the Court's subsequent application of admiralty law. This issue has already been decided by the Fourth Circuit in *White* v. *Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981). However, the defendants claim that in that case the court did not address the situs problem as it relates to maritime law. They also claim to have been denied due process of the law because the plaintiffs were permitted to proffer evidence in support of admiralty jurisdiction prior to the case going to the Fourth Circuit on appeal.

This Court finds no merit in either contention. The court in *White* specifically stated, "Thus, a plaintiff must satisfy both the maritime locality and 'nexus' requirements to invoke the admiralty jurisdiction of the district court" (*White* at 239).

By "maritime locality" the court was obviously discussing situs. While the issue may not have been directly before the court, it is clear from the language that the Fourth Circuit did in fact find that the plaintiffs had satisfied the situs requirement. "Thus, the allegations would meet the locality test of *Executive Jet*. . . . the

Executive Jet criteria have been met and admiralty jurisdiction should be exercised." (*White* at 239-240).

In view of the fact that the issue has been ruled on by the Fourth Circuit, and for the reasons stated therein in the *White* opinion, this Court FINDS that the exercise of admiralty jurisdiction was proper, and that the defendants have not been denied due process of the law.

Issue of Plaintiffs' Employer Having Equal or Greater Knowledge

(Filed by H. K. Porter/ Southern Textile and Pittsburgh Corning)

The defendants charge that the Court was in error for refusing to instruct the jury on the effect of the plaintiffs' employer having equal or greater knowledge about the harmful effects of asbestos exposure. The defendants have cited numerous cases in support of their position that if the employer has equal or greater knowledge the manufacturer is relieved of his duty to warn.

The two primary cases relied on by the defendants, *Marker* v. *Universal Oil Products Company*, 250 F.2d 603 (10th Cir. 1957), and *Littlehale* v. *E. I. duPont de Nemours & Co.*, 380 F.2d 274 (2d Cir. 1967), are clearly distinguishable.

In *Marker*, the injured workmen were injured while using the products in an unforeseeable fashion. The court's ruling was simply that the manufacturer had no duty to warn of dangers arising from the unanticipated misuse of their products. In our case, the injury arose from work with the product in the very way it was intended to be used.

In *Littlehale*, the United States had persuaded the manufacturer of ammunition to delete certain language from its warning label because the Government felt that since only experienced and well-trained personnel would

be using the ammunition, it would be unnecessary to continue with the full warning. However, the injury resulted from the fact that the Government then gave the ammunition to untrained users.

In our case, the defendants fully expected men such as the plaintiffs to be using their products, and there is no evidence that anyone ever instructed the defendants not to put a warning on their product or that only men knowledgeable of the dangers would be using the asbestos material.

This Court remains convinced that the facts in this case are such that it would not have been proper to give the defendants' requested instruction. As this Court has said previously:

> In this case there is no evidence that any of the manufacturers knew the day-to-day operations of the shipyard to the extent that they knew that the shipyard was in a proper position to protect its employees. . . . As a matter of fact, the evidence is just to the contrary, that the shipyard was absolutely not protecting their employees and if the manufacturers had any knowledge about how the shipyard was running its business, theoretically they would have thrown up their hands in horror.

Accordingly, for the reasons cited herein, the Court FINDS there was no error in refusing to give the requested instruction.

Claimed Failure of Court to Instruct on Intervening Cause

(Filed by Raybestos-Manhattan)

Defendant maintains that the Court failed to properly instruct the jury on the issue of the alleged intervening negligence of Newport News Shipbuilding. The Court has reviewed the law in this area and the charge that

was given, and FINDS that the charge adequately and fully presented to the jury the issue of intervening negligence.

The charge given was as follows:

> Now a few words about Newport News Shipbuilding and Dry Dock Company. The Court instructs you that it was the continuing duty of Newport News Shipbuilding as the Plaintiffs' employer, to use reasonable care under the circumstances to furnish the Plaintiffs with a reasonably safe place in which to work. This duty included the duty to warn its employees of any hazard known to the Shipyard or which in the exercise of reasonable care should have been known to the Shipyard likely to be encountered by the employees in the course of their employment. If the Newport News Shipyard failed to exercise such reasonable care, then it was negligent. If you believe from the evidence that such negligence, if any, on the part of Newport News Shipbuilding was the sole proximate cause or when combined with negligence of the Plaintiff, if any, to comprise the sole proximate cause of the Plaintiffs' injuries, then you shall find your verdict in favor of the Defendants as to the claim of such Plaintiffs.
>
> If you find, however, from a preponderance of the evidence that a Defendant sued by a Plaintiff was also guilty of negligence which proximately contributed with Newport News Shipbuilding's negligence to cause such Plaintiff's injury, then you will find your verdict for such Plaintiff against that Defendant, as though Newport News Shipbuilding had not been guilty of negligence at all.

The above charge correctly informs the jury that if they find the negligence of Newport News Shipbuilding combined with the negligence of the plaintiffs to become the sole proximate cause of the injury, then they were

to find for the defendants. *See Rundle* v. *Grubb Motor Lines, Inc.*, 300 F.2d 333 (4th Cir. 1962).

Accordingly, for the reasons stated herein and those set out at trial, the Court FINDS there was no error in the charge given the jury on intervening negligence.

The Permitting of the Recall of Witness Scruggs

(Filed by Raybestos-Manhattan)

Defendant Raybestos-Manhattan, Inc., claims to have been prejudiced by the Court's decision to allow John Scruggs to be recalled by the plaintiffs after direct examination had ended, and plaintiffs' attorney had spoken to the witness outside the courtroom and the witness had spoken to all four plaintiffs. Defendant agrees that Federal Rule of Evidence 611(a) grants the judge discretion in this matter.

No new reasons for denying the recall of the witness have been brought to the Court's attention through the defendant's brief. Accordingly, for the reasons stated by the Court at trial at the time of the recall, this Court FINDS that it did not abuse its discretion in allowing the plaintiffs to recall Mr. Scruggs.

Motion of Pittsburgh Corning for J.N.O.V. as to Plaintiff Hugh Reynolds

(Filed by Pittsburgh Corning)

The defendant Pittsburgh Corning has moved this Court for a judgment non obstante veredicto (hereinafter j.n.o.v.) as to plaintiff Hugh Reynolds. The defendant claims that there is insufficient evidence linking Reynolds to their product.

In deciding whether or not to grant a motion for j.n.o.v., this Court is guided by the proposition that the evidence must be viewed in the light most favorable to the plaintiff. If, after resolving all evidentiary conflicts

in favor of plaintiff and giving him the benefit of every reasonable inference, there remains evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion for j.n.o.v. must be denied. *See Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980); *Azalea Drive-In Theatre, Incorporated* v. *Sargoy*, 394 F. Supp. 568 (E.D. Va. 1975); *Grooms* v. *Minute-Maid*, 267 F.2d 541 (4th Cir. 1959).

A careful review of the evidence reveals that there is more than sufficient evidence in the record to support the jury's verdict in favor of Hugh Reynolds against Pittsburgh Corning.

It is uncontested that Pittsburgh Corning was the sole manufacturer of unibestos from 1962 until the early 1970's. While there was evidence that some unibestos material manufactured by Unarco prior to 1962 may have still been present at the shipyard during the time in question, it was certainly reasonable for the jury to believe that Reynolds had been exposed to Pittsburgh Corning material during this time. The record reveals numerous instances in which the testimony and evidence linked Hugh Reynolds to Pittsburgh Corning material. This evidence, taken in a light most favorable to the plaintiff, is certainly sufficient to support the verdict reached by the jury.

Accordingly, for the reasons stated herein and at trial, this Court FINDS there was sufficient evidence to support the jury's verdict. The motion for judgment notwithstanding the verdict is DENIED.

Motion of Raybestos-Manhattan for J.N.O.V. as to Plaintiffs Walker, Gibbons and Reynolds

(Filed by Raybestos-Manhattan)

The defendant Raybestos-Manhattan has moved this Court for a judgment non obstante veredictor (herein-

after j.n.o.v.) as to plaintiffs Walker, Gibbons and Reynolds. The defendant claims that there is *no* evidence linking Walker and Gibbons to Raybestos products and that there is insufficient evidence linking Reynolds to their products.

In deciding whether or not to grant a motion for j.n.o.v., this Court is again guided by the proposition that the evidence must be viewed in the light most favorable to the plaintiffs. If, after resolving all evidentiary conflicts in favor of plaintiffs and giving them the benefit of every reasonable inference, there remains evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion for j.n.o.v. must be denied. *See Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980); *Azalea Drive-In Theatre, Incorporated* v. *Sargoy*, 394 F. Supp. 568 (E.D. Va. 1975); *Grooms* v. *Minute-Maid*, 267 F.2d 541 (4th Cir. 1959).

Looking at the case in that light, the evidence shows that each of the three plaintiffs in question worked with and/or around asbestos cloth every day throughout their careers as pipecoverers. The evidence also shows that it is not possible, through visual inspection alone, to distinguish between cloth manufactured by Raybestos-Manhattan and cloth manufactured by anyone else. There was also evidence to indicate that all three plaintiffs worked as pipecoverers aboard the cruiser NEWPORT NEWS that was constructed between 1945 and 1949. There was also evidence from a Mr. John Scruggs that Raybestos-Manhattan was the major supplier of asbestos cloth to the pipecovering department, and that Raybestos cloth was specifically used by the pipecoverers aboard the NEWPORT NEWS (on which all three plaintiffs worked). Finally, there was evidence from Mr. Henderson Roberts that glassbestos was used on submarines and that in the early 1960's Raybestos provided 20-25% of the asbestos cloth used by the pipecoverers.

While the evidence of exposure to Raybestos cloth may not be overwhelming, it is well beyond that which would be required in order for a reasonable man sitting on the jury to decide that these three plaintiffs had in fact been exposed to cloth made by Raybestos-Manhattan, and that this exposure was sufficient to have been a producing cause of the plaintiffs' mesothelioma.

Accordingly, for the reasons stated, this Court FINDS that there was sufficient evidence produced, by all three plaintiffs, to support the verdict the jury reached against Raybestos. The motion for judgment non obstante veredicto in favor of Raybestos-Manhattan, Inc. is DENIED.

Motion to Allow as a Credit to the Jury Verdict in Both the Negligence and Breach of Warranty Findings, the Contributory Negligence of the Plaintiffs

(Filed by H. K. Porter/Southern Textile and Pittsburgh Corning)

The defendants claim that it was error for the Court not to reduce the jury's verdict, based on the percentage of comparative negligence found against each of the plaintiffs, in regards to the breach of implied warranty.

It is beyond dispute that if the jury had returned a verdict based solely on the defendants' negligence, the Court would have reduced the award by the percentage of comparative fault found against each plaintiff. That is clearly the rule under admiralty law. However, there is no such clear cut rule in admiralty in regards to breach of implied warranty claims.

While the defendants have cited to Frumer & Friedman, *Products Liability* § 38 E.03 (1982) for the proposition that comparative fault principles have been "uniformly" applied in admiralty actions for "implied warranty sounding in tort," it is not true that a like result follows when the implied warranty theory sounds in contract. Courts

have been split on the issue of whether the implied warranty theory is contract or tort and, if contract, whether comparative negligence should apply.

This Court, for reasons stated at trial, having decided that the implied warranty theory sounds in contract, now must decide whether to apply admiralty law or state law. This case has been decided under admiralty law. However, when there is no clear cut rule in admiralty (i.e., there is a split in the authority), the Court will look to state law for guidance. *See Byrd* v. *Byrd*, 657 F.2d 615 (4th Cir. 1981).

The Virginia rule in this area is clear. The contributory negligence of the plaintiff has no effect on an award of damages based on an implied warranty theory. *See Brocket* v. *Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965), and cases cited therein. Applying this to the case at bar, the Court now finds that under applicable Virginia law there was no error in the Court's handling of this issue. The Court FINDS the defendants have no right to have the jury award, based on the breach of an implied warranty, lowered as a result of the plaintiffs' comparative fault.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

October 20, 1982

Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 82-22-NN

JAMES T. OMAN, FRED R. WALKER,
HUGH V. REYNOLDS, and WILLIE GIBBONS,
Plaintiffs,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; and PITTSBURGH CORNING CORPORATION,
Defendants.

[Filed Oct. 21, 1982]

ORDER

In accordance with the verdict of the jury and the ruling of the Court on all post-trial motions as set forth in a Memorandum Opinion issued simultaneously with this Order and having been restrained by the petition in bankruptcy filed by the defendant Johns-Manville Corp. and Johns-Manville Sales Corporation from entering judgment herein against either and the remaining defendants being jointly and severally liable with Johns-Manville Corp. and Johns-Manville Sales Corporation to the plaintiffs, judgment is rendered in favor of Fred R.

Walker against Raybestos-Manhattan, Inc., H. K. Porter Company and Pittsburgh Corning Corporation in the amount of $265,000 with costs and interest from August 14, 1982, until paid; and judgment is rendered in favor of Willie A. Gibbons against Raybestos-Manhattan, Inc., H. K. Porter Company and Pittsburgh Corning Corporation in the amount of $285,000 with costs and interest from August 14, 1982, until paid; and judgment is rendered in favor of James T. Oman against Raybestos-Manhattan, Inc., H. K. Porter Company and Pittsburgh Corning Corporation in the amount of $180,000 with costs and interest from August 14, 1982, until paid; and judgment is rendered in favor of Hugh V. Reynolds against Raybestos-Manhattan, Inc., H. K. Porter Company and Pittsburgh Corning Corporation in the amount of $214,000 with costs and interest from August 14, 1982, until paid.

Enter: 10/20/82

/s/ J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-2042

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS and HUGH V. REYNOLDS,
Appellees,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, successor by merger with Johns-Manville Products Corporation; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; SOUTHERN TEXTILE CORPORATION and EAGLE-PICHER INDUSTRIES, INC.,
Defendants,

and

RAYBESTOS MANHATTEN, INC. (now Raymark Industries, Inc.); H.K. PORTER COMPANY and PITTSBURGH CORNING CORPORATION,
Appellants.

[Filed Jun. 6, 1985]

JUDGMENT

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. This cause came on to be heard on the record from the

United States District Court for the Eastern District of Virginia, at Newport News and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause be, and the same is hereby reversed. The case is remanded to the United States District Court for the Eastern District of Virginia for further proceedings consistent with the opinion filed herewith.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1821

JAMES T. OMAN, FRED R. WALKER,
WILLIE A. GIBBONS and HUGH V. REYNOLDS,
Appellees,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTEN, INC.; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORP.,
Defendants,

and

PITTSBURGH CORNING CORPORATION,
Appellant.

[Filed Jun. 6, 1985]

JUDGMENT

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, at Newport News and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause be, and the same is hereby reversed. The case is remanded to the United States District Court for the Eastern District of Virginia for further proceedings consistent with the opinion filed herewith.

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 79-1854, 80-1028, 80-1140, 80-1154,
80-1227 and 80-1228

JOHN W. WHITE,

Appellant,

and

RONALD M. CASH, DONAHUE ELLIS, WILLIE A. GIBBONS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, HUGH V. REYNOLDS, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER E. WATSON, O. W. PATRICK, JAMES T. OMAN, FRED R. WALKER, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

v.

JOHNS-MANVILLE CORPORATION, and JOHNS-MANVILLE SALES CORPORATION, successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTEN CORPORATION, a Connecticut Corporation; OWENS-CORNING FIBERGLAS CORPORATION, successor by purchase of Kaylo Division of Owens-Illinois Glass Company; PITTSBURGH CORNING CORPORATION, a Pennsylvania Corporation; THE CELOTEX CORPORATION, successor by merger with Panacon Corporation, which was successor by merger of Briggs Manufacturing Company and Philip Carey Corporation; UNARCO INDUSTRIES, INC., formerly known as Union Asbestos and Rubber Company; H. K. PORTER COMPANY, THERMOID DIVISION, a Delaware Corporation; SOUTHERN ASBESTOS

COMPANY, a foreign corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Appellees,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and UNITED STATES OF AMERICA,

Third-Party Defendants.

JOHN W. WHITE, RONALD M. CASH, DONAHUE ELLIS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER E. WATSON, O. W. PATRICK, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

and

WILLIE A. GIBBONS, HUGH V. REYNOLDS, JAMES T. OMAN, FRED R. WALKER,

Appellants,

v.

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION, successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION; RAYBESTOS-MANHATTEN, a Connecticut Corporation; OWENS-CORNING FIBERGLAS CORPORATION, successor by purchase of KAYLO DIVISION OF OWENS-ILLINOIS GLASS COMPANY; PITTSBURGH CORNING CORPORATION, a Pennsylvania Corporation; THE CELOTEX CORPORATION, successor by merger with PANACON CORPORATION, which was successor by merger of BRIGGS MANUFACTURING COMPANY and PHILIP CAREY CORPORATION; UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS AND RUBBER

COMPANY; H. K. PORTER COMPANY, THERMOID DIVISION, a Delaware Corporation; SOUTHERN ASBESTOS COMPANY, a Foreign Corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Appellees,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and THE UNITED STATES OF AMERICA,

Third-Party Defendants.

JAMES T. OMAN, FRED R. WALKER, JOHN W. WHITE, WILLIE A. GIBBONS, HUGH V. REYNOLDS,

Appellants,

and

RONALD M. CASH, DONAHUE ELLIS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER E. WATSON, O. W. PATRICK, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

v.

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION, successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION; RAYBESTOS-MANHATTEN CORPORATION, a Connecticut Corporation; OWENS-CORNING FIBERGLAS CORPORATION, successor by purchase of KAYLO DIVISION OF OWENS-ILLINOIS GLASS COMPANY; PITTSBURGH CORNING CORPORATION, a Pennsylvania Corporation; THE CELOTEX CORPORATION, successor by merger with PANACON CORPORATION, which was successor by merger of BRIGGS MANUFACTURING COMPANY and PHILIP CAREY CORPORATION; UNARCO

INDUSTRIES, INC., formerly known as UNION ASBESTOS AND RUBBER COMPANY; H. K. PORTER COMPANY, THERMOID DIVISION, a Delaware Corporation; SOUTHERN ASBESTOS COMPANY, a Foreign Corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Appellees,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and THE UNITED STATES OF AMERICA,

Third-Party Defendants.

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, HUGH V. REYNOLDS,

Appellees,

and

JOHN W. WHITE, RONALD M. CASH, DONAHUE ELLIS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER E. WATSON, O. W. PATRICK, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

v.

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION, successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION,

Appellant,

and

RAYBESTOS-MANHATTEN CORPORATION, a Connecticut Corporation; OWENS-CORNING FIBERGLAS CORPORATION, successor by purchase to KAYLO DIVISION OF OWENS-ILLINOIS GLASS COMPANY; PITTSBURGH CORN-

ING CORPORATION, a Pennsylvania Corporation; THE CELOTEX CORPORATION, successor by merger with PANACON CORPORATION, which was successor by merger of BRIGGS MANUFACTURING COMPANY and PHILIP CAREY CORPORATION; UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS and RUBBER COMPANY; H. K. PORTER COMPANY, THERMOID DIVISION, a Delaware Corporation; SOUTHERN ASBESTOS COMPANY, a Foreign Corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Defendants and Third-Party Plaintiffs,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and UNITED STATES OF AMERICA,

Third-Party Defendants.

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, HUGH V. REYNOLDS,

Appellees,

and

JOHN W. WHITE, RONALD M. CASH, DONAHUE ELLIS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER E. WATSON, O. W. PATRICK, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

v.

H. K. PORTER COMPANY, INC., THERMOID DIVISION, a Delaware Corporation,

Appellant,

and

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION, successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION; RAYBESTOS-MANHATTEN CORPORATION, a Connecticut Corporation; OWENS-CORNING FIBERGLAS CORPORATION, successor by purchase of KAYLO DIVISION of OWENS-ILLINOIS GLASS COMPANY; PITTSBURGH CORNING CORPORATION, a Pennsylvania Corporation, THE CELOTEX CORPORATION, successor by merger with PANACON CORPORATION, which was successor by merger of BRIGGS MANUFACTURING COMPANY and PHILIP CAREY CORPORATION; UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS AND RUBBER COMPANY; SOUTHERN ASBESTOS COMPANY, a Foreign Corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Defendants and Third-Party Plaintiffs,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and THE UNITED STATES OF AMERICA,

Third-Party Defendants.

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, HUGH V. REYNOLDS,

Appellees,

and

JOHN W. WHITE, RONALD M. CASH, DONAHUE ELLIS, THOMAS J. HOGGE, MAURICE W. HOLLOWAY, WILSON W. JONES, PERCY C. OVERMAN, JOHN LEE ROLAND, THOMAS R. SAWYER, MILTON L. STACEY, ROBERT L. VAN DYKE, WALTER J. WHITE, JAMES T. LONG, HOMER

E. WATSON, O. W. PATRICK, ROSCOE C. MCGUIRE, ELIAS JAMES WATKINS,

Plaintiffs,

v.

OWENS-CORNING FIBERGLASS CORPORATION, successor by purchase of KAYLO DIVISION of OWENS-ILLINOIS GLASS COMPANY,

Appellant,

and

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION, successor by merger with JOHNS-MANVILLE PRODUCTS CORPORATION; RAYBESTOS-MANHATTEN CORPORATION, a Connecticut Corporation; PITTSBURGH CORNING CORPORATION, a Pennsylvania Corporation; THE CELOTEX CORPORATION, successor by merger with PANACON CORPORATION, which was successor by merger of BRIGGS MANUFACTURING COMPANY and PHILIP CAREY CORPORATION; UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS AND RUBBER COMPANY; SOUTHERN ASBESTOS COMPANY, a Foreign Corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Defendants and Third-Party Plaintiffs,

v.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY and THE UNITED STATES OF AMERICA,

Third-Party Defendants.

Argued Nov. 11, 1980

Decided Oct. 5, 1981

Certiorari Denied Jan. 11, 1982

See 102 S.Ct. 1037

Joel I. Klein, Washington, D. C. (H. Bartow Farr, III, Susan L. Carney, Rogovin, Stern & Huge, Washington, D. C., Robert R. Hatten, Patten & Wornom, Newport News, Va., Richard S. Glasser, Glasser & Glasser, Norfolk, Va., Gene Locks, Philadelphia, Pa., on brief), for appellants.

Robert M. Hughes, III, Norfolk, Va. (C. Michael Montgomery, Glen A. Huff, Steven G. Schwartz, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Norfolk, Va., on brief), for Johns-Manville Corp. and Johns-Manville Sales Corp.

Archibald Wallace, III, Richmond, Va. (Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller, Richmond, Va., on brief), for H. K. Porter Co. and Southern Textile Corp.

Jack E. Greer, J. Anderson Stalnaker, Williams, Worrell, Kelly & Greer, Norfolk, Va., on brief for Owens-Corning Fiberglas Corp.

Allan S. Reynolds, Worth D. Banner, White, Reynolds, Smith & Winters, Norfolk, Va., on brief for Pittsburgh Corning Corp.

John Y. Pearson, Jr., Bruce T. Bishop, Guy R. Friddell, III, Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Va., on brief for Celotex Corp.

William B. Eley, Kenneth A. Phillips, Eley, Rutherford & Leafe, Norfolk, Va., on brief for Eagle-Picher Industries, Inc.

Gerard E. W. Voyer, Taylor, Walker & Adams, Norfolk, Va., on brief for Unarco Industries, Inc.

William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle Corbett, Hubbard, Smith & Payne, Newport News, Va., on brief for Raybestos-Manhatten, Inc.

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

K. K. HALL, Circuit Judge:

John W. White and four other shipyard workers of the Newport News Shipbuilding and Dry Dock Company appeal the judgments of the district court setting aside jury verdicts of $435,000 for each employee and granting judgment *n.o.v.* in favor of various manufacturers of asbestos products. Appellants raise these main issues on appeal: (1) whether the district court erred in denying admiralty jurisdiction; (2) whether the court properly applied Virginia law in determining when their causes of action accrued; (3) whether the court's rulings and instructions on damages were incorrect; and (4) whether the court properly set aside the jury verdicts.

We agree with the appellants that the court should have exercised its admiralty jurisdiction. Therefore, we vacate the judgments of the district court and remand for further proceedings.

I. Background

John W. White, James T. Oman, Fred R. Walker, Hugh V. Reynolds, and Willie A. Gibbons were shipyard workers for Newport News Shipbuilding and Dry Dock Company (Newport News). In the course of their lengthy employments, they worked with asbestos insulation materials in the construction and repair of numerous ships and ocean-going vessels.[1] As a result of exposure to asbestos dust and fibers, these workers developed asbestosis, a severely debilitating lung disease usually characterized by shortness of breath, sharply recurring chest pains, and a deterioration and scarring of the lung tissue. There is no known cure for this condition, and the symptoms normally increase in their intensity and disabling effect.

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[1] White alleged that his last exposure to these asbestos products was in November, 1974, which was more than two years before his suit was initiated. The other shipyard workers claimed that they were continually exposed to asbestos materials until a time within the two-year period preceding the dates on which their respective complaints were filed.

Following extensive discovery efforts by counsel, the district court consolidated these cases and issued three separate, dispositive rulings. In the first of these orders, the court on March 30, 1978, declined to assert admiralty jurisdiction and rejected claims under the Extension of Admiralty Act, 46 U.S.C. § 740, or the general maritime law, 28 U.S.C. § 1333, because the alleged injuries bore no reasonable relationship to traditional maritime activity. Pursuant to its diversity jurisdiction, the court then held that the applicable Virginia two-year statute of limitations for personal injury [2] began to run as of the date of last exposure to asbestos, so that any claims over two years old were barred.

The second disputed order is that of December 10, 1979, in which the district court, referring to its March, 1978, ruling, limited any recoverable damages to only those "injuries which occurred during the period commencing at a date two years before the institution of each plaintiff's action and ending at the date of last exposure." The court also restricted the use of evidence of exposure prior to this period to prove only the identity of the manufacturers which furnished asbestos products used by the employees.

On the first day of trial on November 13, 1979, the court granted summary judgment in favor of the manufacturers against White since his claims were outside of the two-year limitation period. Thereafter, several summary judgment orders were entered in favor of some of the manufacturers as to certain plaintiffs. On December 14, 1979, the jury returned a verdict in favor of Oman, Walker, Reynolds, and Gibbons in the amount of $435,000 for each employee as follows:

Oman v. Johns-Manville and Owens-Corning;

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[2] The district court held that the applicable statute of limitations for personal injury was set forth in Va.Code § 8.01-243 (1977 Replacement Volume).

Walker v. Johns-Manville, Owens-Corning, and Pittsburgh Corning;

Reynolds v. H. K. Porter Co., Inc.; and Gibbons v. Johns-Manville.

The third contested order is that of January 31, 1980, wherein the district court granted the manufacturers' motion for judgment *n.o.v.* and entered judgment in favor of the appellees. The court's rationale for this action was that the employees had failed to adequately prove the extent of any injuries during the two-year limitation period and that the jury verdicts were "shockingly excessive" in light of the actual evidence introduced at trial. After the employees' motions to reconsider were denied, this consolidated appeal was timely filed. The manufacturers have challenged certain evidentiary rulings made during trial in their cross-appeal.

II. Admiralty Jurisdiction

The principal issue confronting us on appeal is whether the district court should have exercised its inherent admiralty jurisdiction in these products liability cases. All parties agree that the decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), sets forth the controlling criteria for determining whether a tort action is "maritime" and thus within the admiralty jurisdiction of the federal courts. The two-part test of *Executive Jet* requires (1) a maritime locality of the injury, and (2) a "significant relationship to traditional maritime activity" to the alleged wrong. *Id.* at 268, 93 S.Ct. at 504. Thus, a plaintiff must satisfy both the maritime locality and "nexus" requirements to invoke the admiralty jurisdiction of the district court.

While the exercise of admiralty jurisdiction must be confined to matters of maritime commerce and navigation, regardless of the maritime situs of the injury, there is growing authority and precedent among the federal courts that products liability actions are cognizable under

admiralty law when the *Executive Jet* criteria are met. In *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977), the court, applying *Executive Jet*, held that a products liability claim for personal injury against the manufacturer of a marine diesel engine with a defective fuel filter was properly within admiralty jurisdiction. Accord, *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978); *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954, 96 S.Ct. 1429, 47 L.Ed.2d 360 (1976); 1 Benedict on Admiralty § 188 (7th ed. 1974).[3]

In the present case, the plaintiff employees alleged in their complaint that they had installed asbestos insulation materials during ship construction and repair in the course of their employment with Newport News. Their work was performed at both the shipyard and dry dock areas as well as aboard the vessels while they were located on navigable waters. Thus, the allegations would meet the locality test of *Executive Jet*.

We must next determine whether the factual circumstances surrounding the employees' injuries satisfy the maritime "nexus" requirement. In *Executive Jet* the Supreme Court simply held that an aircraft which fell into navigable waters did not have a sufficient relationship to maritime activity to trigger admiralty jurisdiction. The opinion of the Court gives no indication as to what actual activities would satisfy the maritime "nexus" test. Hence, we must examine the function of these shipyard workers in fathoming their relationship to maritime commerce and navigation.

As already stated, each of these employees spent a significant part of his working career in the fabrication

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[3] Admiralty jurisdiction of products liability actions was also recognized in the pre-*Executive Jet* decision in *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969).

and replacement of various types of asbestos insulation materials for use on public and private ships. Without such shipyard efforts, these vessels would have been unable to perform their maritime role as carriers of people and cargo. Thus, installation of insulation materials, which by their very nature become an appurtenance, or integral part, of the ship, is clearly essential to the maritime industry. Therefore, the work done by these shipyards bears a "significant relationship to traditional maritime activity" because the installation of the asbestos products has a direct effect on marine navigation and commerce.

We disagree with the manufacturers' contention that a finding of admiralty jurisdiction in these cases would extend such jurisdiction to include the production of any item which finds its way into a maritime environment. The manufacturers' argument that admiralty jurisdiction does not exist in products liability cases where the allegedly defective or hazardous product is not unique to maritime use is inapposite, since the evidence presented at trial clearly established that the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products. Hence, it was quite foreseeable by the manufacturers that these materials would be primarily sold and fabricated for use on ships. While at least one other federal appellate court has seemingly applied admiralty law to a products liability case where the defective component was not limited to maritime use, *Sperry Rand Corp. v. Radio Corporation of America*, 618 F.2d 319 (5th Cir. 1980), we today only hold that under the circumstances of these cases, when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, the *Executive Jet* criteria have been met and admiralty jurisdiction should be exercised.[4]

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[4] Since we find that jurisdiction is present under 28 U.S.C. § 1333, we need not address whether jurisdiction also exists under the Extension of Admiralty Act, 46 U.S.C. § 740.

III. Accrual of Cause of Action

The district court, relying primarily on *Street v. Consumer Mining Corp.*, 185 Va. 561, 39 S.E.2d 271 (1946), and its progeny,[5] ruled in its order of March 30, 1978, that each employee's cause of action accrued as of the date of last exposure to asbestos products. This interpretation of the Virginia statute of limitations has since been held by the Virginia Supreme Court to not apply to plaintiffs afflicted with mesothelioma.[6] *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981). However, because this case falls within admiralty jurisdiction, the equitable doctrine of laches applies rather than the statute of limitations.

In admiralty suits involving personal injury, this Court has held that while federal courts may look to the parallel statute of limitations of the forum state for initial guidance, such statutes alone do not determine the existence of unreasonable delay. In this case, the insidious nature of the disease should also be given consideration. In addition, the defendant still bears the burden of proving inexcusable or inadequately excused delay plus prejudice since laches is an affirmative defense under Rule 8(c), Federal Rules of Civil Procedure. *Giddens v. Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966). *See also, Ashland Oil, Inc. v. Madison Coal & Supply Co., Inc.*, 461 F.Supp. 997 (S.D.W.Va. 1978); *White v. Lundeberg Maryland Seamanship School, Inc.*, 57 F.R.D. 128 (D.Md. 1972). The procedure to be followed by the district court is definitively set forth in *Giddens, supra*, at 128.

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[5] *E.g., Richmond Development & Housing Authority v. Laburnum Construction Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954); *Hawks v. DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966); and *Comptroller of Virginia ex rel. Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (Va. 1977).

[6] In *Locke*, the court found that a cause of action for mesothelioma purportedly arising from asbestos exposure accrues on the date the cancerous tumor forms rather than on the date of last exposure. 958-959, 275 S.E.2d 900.

We do not reach the merits of the issue of laches or how far back the applicable exposure period for each employee should be extended; these issues are remanded for consideration by the district court. Upon determining the relevant periods involved for each shipyard worker, the lower court must ascertain which manufacturers are proper party defendants for each plaintiff and then take steps to reinstate the relevant parties before the court.

IV. Damages

In its order of December 10, 1979, the court applied the Virginia two-year statute for personal injury to determine each employee's relevant period for which damages might be recovered. This resulted in complete summary judgment against White and severely limited the potential recovery of the remaining plaintiffs. Moreover, in his jury charge on the issue of damages, the trial judge instructed the jurors that each plaintiff's recovery was only for "contracted asbestosis from exposure in a particular period of time to asbestos, which is in addition to that asbestosis which he already had previously contracted. The defendants are not liable for any asbestosis contracted prior to the periods involved or for any symptoms resulting from such asbestosis."

After the jury answered the special verdict forms in favor of each employee in the amount of $435,000, the court granted judgment *n.o.v.* because under Virginia law each plaintiff had not presented sufficient evidence "to prove with reasonable certainty the proportional amount of his damages attributable to each [contributing] cause." The court found this rule of state law to be "particularly significant in these cases where each of the plaintiffs entered the relevant time periods with pre-existing asbestos-related infirmities."

The instruction that the manufacturers were not legally accountable for any asbestosis incurred prior to the designated relevant periods of exposure for each employee is

a correct statement of the law. However, it is also well-established tort law that a negligent defendant may be liable for any aggravation of a pre-existing condition. This includes a concealed physical condition, such as a latent disease, and this is so even though such defendant was in no way responsible for the pre-existing condition. Prosser, *Law of Torts* § 43 (4th ed. 1971). While the jury could not properly award damages against the manufacturers for prior exposure-related injuries, it could find from the medical evidence presented at trial that the plaintiffs were diseased by exposures to the asbestos products prior to the relevant periods and that such condition was so aggravated as to cause asbestosis or an exacerbation of asbestosis.

V. Conclusion

Because we find that the exercise of admiralty jurisdiction is proper under the test established in *Executive Jet*, the application of Virginia's two-year limitation period to the employees' claims was error. Therefore, the judgments entered in these cases, or affected by our present disposition of this appeal, must be vacated and a new trial conducted under the admiralty jurisdiction of the federal court.[7]

VACATED AND REMANDED.

WIDENER, Circuit Judge, concurring:

While I agree with the majority that admiralty jurisdiction attaches to the appellants' claims, I believe that certain aspects of that decision require more explanation.

The first involves the conclusion that the locality component of the test enunciated in *Executive Jet Aviation*,

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[7] Those remaining issues raised on appeal regarding the effect of the two-year limitation period on the burden of proof relating to injuries and damages, as well as the challenges to evidentiary rulings raised on cross-appeal, have become moot and are not addressed in light of our disposition of the primary issues of this consolidated appeal.

Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), has been met. We have recently held, in *Holland v. Sea-Land Service, Inc.*, 655 F.2d 556 (4th Cir. 1981), that an action sounding in tort is ". . . only cognizable under traditional admiralty jurisdiction if (1) the wrong occurred on navigable waters and (2) bore a significant relationship to a maritime activity." *Holland*, supra, at 558. The district court made no finding as to the situs of the wrong in this case. In the present opinion, the court notes only that the situs requirement is satisfied by allegations in the complaint of injury both on navigable waters and on land.

I note that in their affidavits the plaintiffs claim that at least 90% and as much as 97% of their exposure to the manufacturers' products occurred on navigable waters. Given this overwhelming predominance of exposure arising in the proper maritime situs, and especially taking into account that no issue has been made of the extent of the exposure on navigable waters, I would agree that the entirety of the plaintiffs' tort claims are properly cognizable in admiralty. Our decision should not, however, be read to imply a similar rule in all cases in which there is exposure to injury both on land and on navigable waters.

I am troubled by the fact that the majority addresses its analysis solely to the question of admiralty jurisdiction over claims sounding in tort. The plaintiffs' complaints in this case generally assert claims based upon the manufacturers' failure to warn of the dangers of the asbestos-based products were fit for their intended use. While the court's analysis of admiralty jurisdiction over torts is clearly applicable to the former claims, its application to the latter is doubtful if applicable at all.

In its order of September 13, 1979, in the related case of *Johns-Manville Corporation, et al. v. United States*, No. 78-648-N (E.D.Va. December 21, 1979), the district court held that a claim of breach of an implied warranty

sounded in contract rather than in tort. This aspect of the district court's order was not challenged by the parties on appeal, and, in fact, formed a basis of our opinion in that case, *Glover v. Johns-Manville Corporation, et al.*, 662 F.2d 225, No. 80-1085 (4th Cir. 1981), as well as in *White v. Johns-Manville*, 662 F.2d 243 (4th Cir. 1981).

If we accept that characterization as correct, it is clear that the *Executive Jet* test defining the extent of admiralty jurisdiction over tort claims is inapplicable here. While similar to that test, the question of the existence of admiralty jurisdiction over a contractual claim is decided upon a determination of whether the contract is maritime in nature. See *Kossick v. United Fruit Company*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); *Sanderlin v. Old Dominion Stevedoring Corporation*, 385 F.2d 79 (4th Cir. 1967); *Ford Motor Company v. Wallenius Lines, M/V Atlantic Cinderella*, 476 F.Supp. 1362 (E.D.Va. 1979). Our opinion fails to apply this test to the plaintiffs' implied warranty claims.

There is, however, a great similarity between the significant relationship with maritime activity required under *Executive Jet* and the question of the existence of a maritime contract. In light of our finding that the tort claims in this case have a sufficient nexus with a maritime activity to support admiralty jurisdiction, I believe that the claims on implied warranties arising in the same factual setting must be considered to be maritime in nature. Therefore, I agree that the plaintiffs' claims, whether sounding in tort or in contract, are cognizable in admiralty.

I do not agree with the majority opinion as it describes the plaintiffs' claims as cognizable in a court of admiralty pursuant to its "inherent jurisdiction." P. 239. I do not believe that inferior federal courts have any inherent jurisdiction. Our determination of jurisdiction in footnote 4 as under 28 U.S.C. § 1333, I believe to be sufficient.